Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JON EDELMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the judge during a federal criminal trial meets *ex parte* in secret with the prosecuting attorney to review prosecution strategy and plan rulings, may the reviewing appeliate court hold this to be harmless error without requiring a full record of what happened?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals were petitioner, respondent, and Bernhard Fred Manko.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case October 9, 1992.

OPINIONS BELOW

No opinion was rendered by the District Court. Pertinent portions of the transcript of proceedings in that court appear in the appendix at A. 29a-36a.[1] The opinion of the Court of Appeals is reported at 979 F.2d 900 and is reproduced in the appendix at A. 1a. The pertinent portion of that opinion is at A. 16a-19a.

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[1] References to "A." are to the appendices to this petition.

JURISDICTION

The judgment of the District Court was entered December 2, 1991. A. 27a. The opinion and judgment of the Court of Appeals were entered October 9, 1992. A. 1a. A timely petition for rehearing was filed October 23, 1992 and was denied by the Court of Appeals December 4, 1992. A. 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULE, AND CODE PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, Rule 43 of the Federal Rules of Criminal Procedure and pertinent provisions of the Code of Conduct for United States Judges, Code of Judicial Conduct, Model Code of Professional Responsibility, and Model Rules of Professional Conduct are reproduced at A. 38a-45a.

STATEMENT

Petitioner was tried and convicted in the United States District Court for the Southern District of New York for making and aiding and abetting false tax returns and for conspiracy to commit tax offenses.[2]

A. The *Ex Parte* Proceeding in the District Court.

Near the end of the trial, the prosecuting attorney went secretly to meet the judge outside the courtroom, without the knowledge of defense attorneys. What exactly transpired at that *ex parte* meeting—which the judge directed should be kept secret—is still not known. No affidavit about it was submitted by the prosecution, and the judge never offered any explanation or description of the meeting at all. A portion of the meeting was transcribed, but the sealed partial transcript was not disclosed until weeks after the trial. A document or documents that changed hands between the prosecutor and the

[2] 26 U.S.C. § 7206 and 18 U.S.C. § 371.

judge were never disclosed or made part of the record. What is known, based on the incomplete transcript and incomplete representations made by the prosecutor after the secret meeting was discovered, is the following:

1. After the close of the evidence the government's attorney, without defense counsel's knowledge, went to the judge's robing room with a document or documents. According to a transcribed fragment of the meeting, the prosecutor handed the judge "a document I typed up headed 'Excerpts of testimony.' . . . It's a mockup of a chart I propose to use in my rebuttal summation." A. 29a, *infra*. The prosecutor in the transcribed portion explained that:

> "*I bring this to you* ex parte *because I didn't want to let the defense know* at this time before they sum up exactly *what I am proposing to do in my rebuttal* and I did want to apprise the court that I am planning on doing this so that your Honor could allot whatever time is necessary . . . should there be objections to this."

A. 29a-30a (emphasis supplied).

2. The judge responded, again in the transcribed portion:

> "THE COURT: *No, I don't think you should disclose it.* What I will do is *I will check the places that you expect to use* quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use."

A. 30a (emphasis supplied).

3. The document or documents that the prosecutor submitted and the judge retained were not marked and are not in the record. The transcript of the secret meeting did not purport to be complete, and obviously was not. The judge ordered that the transcribed portion of the *ex parte* meeting be sealed and not disclosed to defense counsel.

4. When the transcript of that day's proceedings in open court was provided by the court reporter, petitioner's counsel noticed that sequentially numbered pages were missing and sealed. He inquired, and was told by the government counsel that there had been an *ex parte* proceeding. Petitioner's counsel requested that any transcript of proceedings be provided to him. The court replied "No," and that "You will see it as soon as you are finished." A. 31a.

5. After the defense had closed, the prosecution provided to the defense certain charts that the prosecution said it would use in rebuttal summation. These included blowups of more than two dozen paraphrases of the testimony. Petitioner's counsel objected that there was insufficient time to review the charts for accuracy. Petitioner's counsel also objected that

> "It is unfair and incorrect procedure in that the court apparently heard an application for leave to do this ex parte, on Tuesday morning, 12/29, even before defense summation commenced, and while the prosecution summation was under way, and gave an advisory opinion."

A. 34a. The court replied, "Counsel, if you knew what the record was, you wouldn't be making these statements . . . ." *Id.* But the court still refused to provide to defense counsel the sealed pages from the *ex parte* meeting, and ruled that "[w]e'll leave it until after the rebuttal is completed and the jury has gone home . . . ." A. 35a. The jury returned a verdict convicting defendants on all counts, but the court continued to deny petitioner's request to see the sealed pages.

6. A month after the verdict, the United States Attorney advised the District Court that the government now consented to unsealing the two pages of partial transcript taken during the *ex parte* meeting. A. 37a. The court then allowed the sealed pages to be made available to petitioner.

B. The Affirmance by the Court of Appeals.

Petitioner appealed, arguing that the District Court's secret *ex parte* meeting to plan prosecution strategy with the prosecutor violated the Fifth and Sixth Amendments, denying due process as well as his right to be present, at least through counsel, at all critical stages of a criminal trial. Petitioner pointed out that the judge had never offered any explanation or description of what had occurred, and that whatever documents the prosecutor had handed the judge had not been disclosed in the record. The record also lacked copies of the charts the prosecutor later used. At oral argument, when the Court of Appeals called it "incomprehensible" that the government had not "show[n] it to your adversary and let[] them make whatever argument they wanted to make at that juncture," the government attorney responded that "I clearly should have done that." Tr., U.S.C.A., at 30.

The Second Circuit, in the four pages of its opinion pertinent to this petition, observed both that the conduct of judge and the prosecutor had been "highly improper" and "unnecessary"—but that this was no reason to reverse. The court "note[d] at the outset our inability to fathom why the prosecutor would jeopardize a four month trial" with a meeting the court said was "improper and unnecessary" and "highly improper." A. 17a, 18a, 19a. It acknowledged cases holding that *ex parte* proceedings in criminal trials "should not be conducted except in extraordinary circumstances," [3] and concluded that "[n]o such extraordinary circumstances are present here." A. 17a. On the contrary, it said,

> "the prosecution initiated this *ex parte* proceeding in a blatant attempt to win a tactical advantage, to get a 'leg up.' Unhappily, the district court went along with the prosecution." A. 18a.

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[3] *E.g.*, *United States* v. *Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); see also *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992).

Nevertheless, the Court of Appeals took no corrective action and did not direct any further inquiry. It did not reverse. It did not even remand for further proceedings to determine the exact facts regarding the *ex parte* meeting.

The Court of Appeals affirmed despite the fact that the government never submitted any affidavit as to the scope of the meeting; and despite the fact that the district judge likewise never made any explanation whatsoever of what had happened, nor of why the transcript had been sealed until long after the trial, and the documents never disclosed. The Second Circuit held that a secret meeting between judge and prosecutor to discuss and plan the prosecution's closing and the judge's rulings—with the judge agreeing to check in advance paraphrases that the prosecution intended to use, and with the *judge directing that the meeting and documents* exchanged there *not be disclosed to defense counsel*—was not a reason for reversal.

Then the Court of Appeals went on to make assumptions that went beyond the incomplete record: that the transcript included all it needed to know,[4] and that the documents handed to the judge had contained the same paraphrases and quotations as charts that the prosecutor later used in rebuttal (which were not in the record on appeal, either). A. 16a, 19a.[5] Again referring to "this four month trial," A. 19a, the Court of Appeals concluded that "even if the conference did influence the

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[4] Petitioner pointed out that the pages that were sealed demonstrate on their face that some encounter or exchange of unknown length and content had preceded the transcribed portion, see A. 29a, and neither the government nor the judge ever claimed they were complete.

[5] Whatever documents the prosecutor handed to the judge during their *ex parte* meeting were never disclosed or made a part of the record. The charts, which the Court of Appeals called a "chart" said were "clearly accurate," A. 19a, were not in the record, either, so the Court of Appeals had never seen them. (In fact the government conceded that the charts contained errors. A. 36a.)

judge's decision to allow the chart, . . . we doubt that this chart [which was not in the record] . . . played even a minimal role in influencing the jury verdict." *Id.* Rehearing was denied without opinion. A. 25a.

REASONS FOR GRANTING THE WRIT

A circuit that is one of the frequent venues for federal criminal prosecutions has tossed aside the basic fair-trial guarantees of presence, public trial, and even-handedness. All were violated, intentionally, in about as flagrant a manner as could be imagined. This holding comes a few weeks after one by the Sixth Circuit (which the Court of Appeals chose to ignore in silence) in which the Sixth Circuit held that an *ex parte* conference between judge and prosecutor that was far less significant, and not secret at all, was *per se* reversible error.

The Second Circuit's holding tells the legal community that government attorneys and judges can secretly discuss and rehearse strategy and rulings together during a trial, that the judge can instruct the prosecutor to keep it secret, and that on review this will be ignored as harmless error—even when there is no complete record of what occurred. The Court of Appeals' failure at least to remand to require that an adequate record be made not only defies logic: it is in flat conflict with decisions in other circuits and state supreme courts that hold that when an *ex parte* contact occurs, the reviewing court must have a full record to determine what happened, before it can decide, and that the burden to prove what happened rests on the government. The court's holding also conflicts with decisions of other circuits and state supreme courts that in criminal trials *ex parte* proceedings unless there is dire necessity are intolerable, and with this Court's holdings that due process of law requires at a minimum a public trial conducted by an impartial judge.

I. THE SECOND CIRCUIT'S AFFIRMANCE WITHOUT A FULL RECORD OF WHAT HAPPENED *EX PARTE* CONFLICTS WITH DECISIONS OF THE FIRST, SIXTH, NINTH AND ELEVENTH CIRCUITS AND OF STATE SUPREME COURTS.

Ex parte contacts between judge and prosecutor—particularly secret ones—are not a trival matter, especially in a federal felony prosecution. It is well established in many circuits, and state supreme courts applying the United States Constitution have held also, that a reviewing court will not simply assume that what occurred in an *ex parte* meeting was harmless. In fact, the burden of establishing both (a) what occurred and (b) that it was harmless, has always until now been placed on the government. It has been called a "heavy" burden.

A. Other Circuits and State Supreme Courts Hold That Due Process Requires a Complete Record for Review.

The Court of Appeals, faced with a gross and undeniable instance of prosecutorial and judicial misconduct at a criminal trial, misconduct which the court itself called "highly improper," did not require an adequate record to be made. Instead, it delivered a scolding and dismissed the whole thing, based on nothing but speculation.

The Second Circuit here had no record except a partial transcript of what occurred when the district judge and the Assistant United States Attorney met. That fragmentary record itself disclosed that a document changed hands; but the very document, which the judge apparently retained, was never disclosed or made part of the record, and what became of it was never revealed. The Court of Appeals assumed that the document was limited to, and identical with, the charts used at closing; it further assumed that the charts, which paraphrased testimony, were not consequential—but the charts were not in the record, either.

Before a reviewing court can decide that the error was harmless, it must know exactly what occurred. "We

cannot affirm what we cannot review . . . ." *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 859 (3d Cir. 1990), *cert. denied sub nom. General Elec. Co.* v. *Knight*, 111 S. Ct. 1584 (1991). Here, the Second Circuit could only guess. The full scope of what occurred between judge and prosecutor at the *ex parte* meeting, the record simply does not show. The transcript of what was said is incomplete on its face. A. 29a. There were no affidavits whatsoever by the participants as to what happened. Nor was there any explanation by the judge.[6] Neither were the document or documents that the government attorney handed to the judge made part of the record. The Second Circuit should have reversed outright based on what this record already discloses. But at the very least, it should have remanded to require that a complete record be made.

The Second Circuit went beyond holding that the record here showed only harmless error. Rather, its holding is that harmlessness can be presumed, without a full record, by the reviewing appellate court. In effect, it concluded that secret *ex parte* meetings between a federal judge and a federal prosecuting attorney during a trial are to be assumed harmless—and that no record will be required to be made that might upset that comfortable assumption.

What other circuits have held is wholly to the contrary.

The Ninth Circuit requires exactly what the Second Circuit rejected. In *Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989), a civil tax fraud case (not even a criminal prosecution) in which it was learned that government counsel had delivered a memorandum *ex parte* to the court, the Ninth Circuit, citing the Fifth Amendment's

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[6] *Cf. United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). Also, the record does not contain the order of the court that sealed the transcript, nor the order that unsealed it. The whole nature of the sealing process in this case, and the judge's orders to the court reporter, are unexplained.

due process clause, remanded and directed an evidentiary hearing because

> "[s]*ince the memorandum does not form a part of the record, we do not have sufficient knowledge* to enable us to determine whether taxpayers might have been prejudiced."

889 F.2d at 884 (emphasis supplied). The court held that "[w]e must remand, therefore, . . . with instructions to conduct an evidentiary hearing." *Id.* at 885.[7] As the Ninth Circuit explained in another case, "if we are to review the district judge's decision [made after an *ex* parte conference with the prosecutor], *we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts . . . .*" *United States* v. *Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987) (emphasis supplied).

The Eleventh Circuit follows the same rule. In *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986), defendants sought the extraordinary relief of mandamus to compel a district judge to release "transcripts of an *ex parte* presentation made to the district court by the government in support of its motion to disqualify" defense counsel. The Eleventh Circuit held that "to ameliorate any unfair advantage—or the appearance thereof—that might have resulted from the *ex parte* presentation at issue here, the transcript must be made available to petitioners." *Id.*, 803 F.2d at 612.

Similarly, in *Grieco* v. *Meachum*, 533 F.2d 713, 719 (1st Cir.), *cert. denied sub nom. Cassesso* v. *Meachum*, 429 U.S. 858 (1976), an evidentiary hearing was held on *habeas corpus* when it was learned that the prosecuting

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[7] Remand demonstrated that the hearing was not an empty gesture. After a complete record had been made, the Ninth Circuit reversed, explaining that "[b]efore the remand, we were unable to assess any prejudice . . . ." *Guenther* v. *Commissioner*, 939 F.2d 758, 761 (9th Cir. 1991).

attorney in a state-court trial had furnished memoranda to the judge without giving copies to defense counsel. The First Circuit held such *ex parte* submission of documents an action "meriting censure," and affirmed only because the hearing resulted in a record that established waiver by defense counsel's knowing acquiescence in the *ex parte* practice. 533 F.2d at 719.

The Supreme Court of South Carolina followed the same due-process rule in *State* v. *McGuinn*, 268 S.C. 112, 117, 232 S.E.2d 229, 231 (1977), holding that because an *ex parte* discussion between judge and prosecutor had been off the record, "this Court has no way of knowing whether the rights of the appellant were prejudiced and, accordingly, we remand to the lower court for the purpose of resentencing."[8] *Accord*, *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 225 (D.C. Cir. 1959) (ordering hearing to determine nature of *ex parte* communications in administrative proceeding).

Three times in the space of four pages the Second Circuit here referred to petitioner's having been a "four month trial." A. 16a, 17a, 19a. Is one to infer that if the prosecutor and judge had met secretly during a two-week trial, the constitutional rule would have been different? Even if the length of the trial matters, as it seems to have to the Second Circuit, the Court of Appeals without upsetting the conviction could have remanded for an evidentiary hearing or taken other appropriate steps to find out the full extent of, and exactly what, happened. A remand for such purpose is not a reversal. And if after remand the record did not confirm the Court of Appeals' speculation of harmlessness, then reversal, even of a four-month trial, would be called for. *Guenther* v. *Commissioner*, *supra*. After all, it was not petitioner who caused the "highly improper" intentional conduct of

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[8] See also *State* v. *McCarver*, 329 N.C. 259, 261, 404 S.E.2d 821, 822 (1991) ("there was no record made of the conversations at the bench and we are unable to determine whether the error was harmless . . . .") (applying state confrontation clause).

judge and prosecutor that created this extraordinary and unseemly situation.

B. Other Circuits Place a "Heavy" Burden on the Government To Demonstrate That an *Ex Parte* Contact Was Harmless.

In other circuits, when any *ex parte* discussion between judge and prosecutor has occurred in a criminal trial, *the burden is placed on the government* to establish that what occurred was harmless. The leading and much-cited case is the First Circuit's decision in *Haller* v. *Robbins*, 409 F.2d 857 (1st Cir. 1969), which held this to be so fundamental a part of due process that it also applied to state criminal procedure under the Fourteenth Amendment. The First Circuit admonished that

> "the burden of proving lack of prejudice is on the state, and it is a heavy one. . . . The burden of excluding prejudice . . . is on the state . . . ."

409 F.2d at 860, quoted and applied most recently in *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992).

The same rule applies in the Ninth Circuit. In *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), the Ninth Circuit reiterated that "the burden of showing no prejudice" is on the government; the court held that the burden had been met in that case—but only because "both the judge and the prosecutor gave accounts fully explaining what transpired in the meeting." 638 F.2d at 1188.[9]

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[9] See also *State* v. *McCarver*, *supra*, 329 N.C. at 261, 404 S.E.2d at 822 ("[u]nless the State can show that this denial of the defendant's right to be present is harmless beyond a reasonable doubt there must be a new trial"). In other federal cases convictions have been affirmed in spite of an *ex parte* violation—not where, as here, prosecution strategy had been discussed, but rather where the *ex parte* contact was demonstrated by the government on a complete record to have been so plainly trivial that it did not affect the fairness of the trial. See, *e.g.*, *United States* v. *Adams*, 785 F.2d 917, 920 (11th Cir.) (affirming conviction, noting that "the *entire* conference

Here, however, the record is incomplete; the government on this record could not possibly meet its burden. The Court of Appeals did not require it to do so. Instead of following the law in other circuits and placing a "heavy" burden on the government, the Second Circuit placed no burden on the government at all. It placed the burden on the defendant, instead. A. 18a. The Second Circuit's rejection of federal law applied elsewhere should be reviewed by this Court.

C. The Decision Rejects This Court's Reasoning in *Rushen* v. *Spain*.

Rushen v. *Spain*, 464 U.S. 114 (1983), was a case in which the trial judge had had *ex parte* meetings, not with a prosecuting attorney, but with a juror who discovered in the course of a lengthy trial that she had been acquainted with the victim of an unrelated crime. This Court recognized the "day-to-day realities of courtroom life" by which a juror may "have occasion to speak to the trial judge about something." 464 U.S. at 118-19. This Court held that the prejudicial effect, if any, of the communication "can normally be determined by a post-trial hearing," and that "[t]he post-trial hearing in this case created more than adequate support" for concluding there had been no prejudice. *Id.* at 119-20; see also *id.* at 126, 128 (Stevens, J., concurring) (there was "a meaningful hearing . . . in which the substance of the *ex parte* conversations . . . could be established," and "no contention that the post-trial hearing was inadequate").

The Second Circuit's decision here is irreconcilable with the reasoning of *Rushen* v. *Spain* for at least two reasons:

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was transcribed") (emphasis supplied), *cert. denied*, 479 U.S. 1009 (1986); *United States* v. *Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983) (emphasizing that "[h]ere a verbatim transcript of the *ex parte* proceeding was made, sealed, and forwarded to the Court as part of the record"); *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980) ("both the judge and the prosecutor gave accounts fully explaining what transpired in the meeting").

1. Here there was no hearing at all, meaningful or otherwise. What partial transcript there was, was kept under seal by the trial court until long after the trial, when the government finally agreed to release it. A. 35a, 37a. The document(s) handed to the trial judge, or their disposition, have not been disclosed to this day. Nevertheless, the Second Circuit affirmed on a theory that the document(s) probably resembled the charts (which it did not see), and that the whole thing must have been harmless. A. 19a.

2. Although an occasional *ex parte* exchange between a juror and judge may be one of the "day-to-day realities of courtroom life," 464 U.S. at 119, an *ex parte* meeting of judge and prosecuting attorney to discuss future events in a criminal trial certainly is not. A judge's meeting with an unsophisticated and presumably neutral juror is hardly the same as meeting with an attorney for the government who is engaged, as the Second Circuit recognized, "in a blatant attempt to win a tactical advantage, to get a 'leg up.'" A. 18a.[10]

II. THE SECOND CIRCUIT'S PERMITTING A JUDGE TO MEET *EX PARTE* TO PLAN CLOSING ARGUMENT WITH THE PROSECUTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND STATES AND OF THIS COURT.

Even on the incomplete record that exists now, swift reversal in most circuits and many states would follow without needing to know anything more.

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[10] For cases ordering evidentiary hearings to enable review of *ex parte* communications between judge and juror, see, *e.g.*, *Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954) ("the burden rests heavily on the Government to establish . . . that such contact with the juror was harmless"); *United States* v. *Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) ("the facts must be carefully ascertained before a decision is made on whether a new trial is required"); *cf. DeGrave* v. *United States*, 820 F.2d 870, 872 (7th Cir. 1987) (hearing required for *ex parte* contact of jurors and court reporter).

A. The Sixth Circuit and Other Circuits and States Reverse for Far Less Than a Strategy Session Between Judge and Prosecutor.

Petitioner's conviction was affirmed because he was tried in the Second Circuit instead of the Sixth. In *United States* v. *Minsky*, 963 F.2d 870 (6th Cir. 1992), the district judge—not secretly, but in plain view of all parties and counsel—"held a sidebar conference with *only* the prosecutors present" to inquire whether the defense had been informed of certain statements that were possibly Jencks Act or *Brady* material.[11] 963 F.2d at 872-73 (emphasis in original). Just ten months ago the Sixth Circuit in a forceful opinion reversed. It reiterated that *ex parte* proceedings "can only be justified and allowed by compelling state interests." 963 F.2d at 874, quoting *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977). It added, quoting *Haller* v. *Robbins*, *supra*, that "the burden of proving lack of prejudice is on the government and it is a heavy one." It cited cases from other circuits to the same effect, and held that "the *ex parte* sidebar conference violated Minsky's right to a fair trial and was a Sixth Amendment violation." 963 F.2d at 874, quoting in part 409 F.2d 860.

There is no way that the Second Circuit decision can be reconciled with *Minsky*.[12] *Minsky* was reversed because the district court there had held an *ex parte* bench conference with the prosecutor at which, as here, the subject under discussion was the government's conduct of the trial—even though it was not done in secret and was a far lesser infraction of the defendant's rights.

The Second Circuit opinion here, indeed, acknowledges that the *ex parte* meeting was not only "highly improper" but "wholly unnecessary." A. 17a, 19a. And worse than

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[11] 18 U.S.C. § 3500; *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[12] Petitioner strenuously argued the *Minsky* decision to the Court of Appeals, both in the initial briefs and on petition for rehearing. The Second Circuit elected never to mention it.

Minsky—in which the *ex parte* conference at least took place in full view of all—and in which a full transcript was made and was part of the appellate record—here by contrast the meeting occurred in secret, and was discovered only when counsel noticed pages missing from the transcript. Even then, the district judge here uttered not a word to explain it, instead offering a mysterious comment to counsel that "if you knew" what happened, counsel might act differently. A 34a. Also unlike *Minsky*, the document that was discussed *ex parte* is not in the record at all, and the transcript that exists is palpably incomplete.

Also in the past year the Supreme Court of Florida applied the due process clause of the Fourteenth Amendment to an *ex parte* communication in a criminal trial and reversed, holding that

> "Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case."

Rose v. *State*, 601 So. 2d 1181, 1183 (Fla. 1992). The Supreme Court of Idaho holds the same. *State* v. *Crawford*, 99 Idaho 87, 95, 577 P.2d 1135, 1143 (1978) (due process includes right "to be present at all stages of the trial from arraignment to verdict" if "absence could, under some set of circumstances, be harmful") (quoting *Polizzi* v. *United States*, 550 F.2d 1133, 1137-38 (9th Cir. 1976)). *Accord*, *Sanborn* v. *Commonwealth*, 754 S.W.2d 534, 549 (Ky. 1988) ("*after* trial has commenced . . . *every order requested of the court* is a matter to be addressed in the *presence of opposing counsel*," citing *Heller* v. *Robbins*, *supra*) (emphasis in original).[13]

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[13] See also *State* v. *Barker*, 227 Neb. 842, 847, 420 N.W.2d 695, 699 (1988) (under state law, invited "ex parte communication . . . reasonably raises a question about the judge's impartiality" and

B. Discussing Prosecution Strategy Is Not an "Extraordinary Circumstance" Justifying Exclusion of the Defendant.

The Second Circuit paid lip service to the rule observed in most circuits that *ex parte* contacts are tolerated only in "extraordinary circumstances." [14] It acknowledged that "[n]o such extraordinary circumstances are present here." A. 17a. But it forgot the rest of the rule that the other circuits and states follow: that when such an "improper and unnecessary" meeting occurs, reversal follows unless the government sustains the "heavy" burden of establishing harmlessness.

Other courts have held that even *ex parte* conferences occurring for arguably laudable reasons constitute reversible error because of the danger they pose to the appearance of fairness. Thus a state supreme court applying the due process clause, reviewing the incomplete record of an *ex parte* meeting between judge, prosecutor, and crime victim that occurred immediately prior to sentencing, vacated the sentence, explaining that "[w]hile it is unlikely that anything improper was said, it is the *possibility of prejudice* that we are concerned with." *Locklear* v. *Harvey*, 273 S.C. 58, 59, 254 S.E.2d 293 (1979) (emphasis supplied).

The meeting here, besides being unnecessary, was not laudable at all. The government did not even attempt

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there is "no requirement that a litigant must show a judge's prejudice" from it). State courts have also reversed because *ex parte* communications violate the Code of Judicial Conduct, Canons 2 and 3. See, *e.g.*, *State* v. *Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979); *Rose* v. *State*, *supra*; A. 41a-43a.

[14] Extraordinary circumstances permitting *ex parte* proceedings might arise, for example, when "a juror or witness, having been threatened, wished to speak with the judge privately about the threat." *LaChappelle* v. *Moran*, 699 F.2d 560, 565 (1st Cir. 1983); see also *United States* v. *Adams*, 785 F.2d 917, 920 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

to justify it.[15] And the portion of the *ex parte* conference that was transcribed reinforces and confirms the worst inferences. Not only did the judge discuss strategy with the prosecutor and seal the record. The judge instructed the government attorney not to tell the defendant, A. 30a, which in itself was "obviously improper." *United States* v. *Martinez*, 667 F.2d 886, 890 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982).[16] The judge then volunteered to prescreen the government's closing:

> "THE COURT: What I will do is I will check the places that you expect to use quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use.
>
> MR. CLEARY: Thank you, Judge." A. 30a.

As the Court of Appeals here observed:

> "The only purpose for showing the court the precise quotes the government wished to use was to enable the court to review the chart for accuracy before the defense had an opportunity to present any arguments to the court. In short, the prosecution initiated this *ex parte* proceeding in a *blatant attempt to win a tactical advantage*, to get a 'leg up.' *Unhappily, the district court went along with the prosecution.*"

A. 18a (emphasis supplied). The District Court vetted the government's submission in order to be prepared in advance to be in a position to respond to defense counsel's objections as they might arise. The Seventh Circuit judges have pointed out that

> "The knowledge that a judge will rule in a particular way is invaluable information to the lawyer

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[15] "And hindsight being 20/20, I realize that I shouldn't even have done that." Tr. of oral arg., U.S.C.A., 2d Cir., at 31 (counsel for United States).

[16] That much the transcript discloses. The Assistant United States Attorney in their private meeting told the judge, "I bring this to you ex parte because I didn't want to let the defense know at this time before they sum up . . . ." The judge replied, "*No, I don't think you should disclose it.*" A. 29a-30a (emphasis supplied).

and the client, particularly when the other lawyers and their clients do not share in that information." [17]

The fundamental violation in the District Court's conduct here was doubled because, after committing the initial transgression of holding the secret *ex parte* meeting at all, the court then immediately sealed the partial transcript, for no discernible reason—except to assure that defense counsel would be surprised when the government's preplanned rebuttal chart was sprung on them after they had completed their closing arguments. The error was trebly compounded when, after the defendants learned of the meeting and asked to know what had happened, and protested, the court ordered the partial transcript withheld from them until after "the jury has gone home," A. 35a, indeed, until six weeks after the conclusion of the trial.

C. Petitioner's Right To Be Present at a "Critical Stage" Was Violated.

The accused has the important right, under the Fifth and Sixth Amendments and Rule 43, Fed. R. Crim. P., to be present at all critical stages of a federal criminal prosecution. See, *e.g.*, *Rushen* v. *Spain*, 464 U.S. 114, 117 (1983) ("right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights"); *Rogers* v. *United States*, 422 U.S. 35 (1975); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) ("[i]t is now accepted . . . that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings . . ."); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-06 (1934). This Court has held that even in a civil case, "the orderly conduct of a trial by jury . . . entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is im-

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[17] Written Public Censure, Seventh Circuit Judicial Council (1985), quoted in Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*, 74 JUDICATURE 96, 98 (1990).

paneled until it is discharged after rendering the verdict." *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919). And "[i]f this be true in a civil case, *a fortiori* is it true in a criminal case." *Shields* v. *United States*, 273 U.S. 583, 588 (1927).

This Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States* v. *Cronic*, 466 U.S. 648, 659 n.25 (1984) (collecting cases). Discussion of what the prosecutor is to be allowed to show the jury during the last argument the jury hears can hardly be deemed less than a critical stage. See *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *United States* v. *Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (summation is "critical stage"); see also *United States* v. *Minsky*, *supra* (sidebar conference on discovery is "critical stage").[18]

III. SECRET ASSISTANCE BY A JUDGE TO A PROSECUTOR DENIES DUE PROCESS OF LAW.

In *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991), this Court held that "structural defects in the constitution of the trial mechanism . . . defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial."

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[18] *Accord, e.g., Application of Storer Communications, Inc.*, 828 F.2d 330, 335 (6th Cir. 1987) ("we do not approve the practice of government counsel in a criminal prosecution approaching the trial judge *ex parte* in any matter related to the pending case"). The defendant (as well as defense counsel) is entitled to be present when "there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings." *United States* v. *Stratton*, 649 F.2d 1066, 1080 (5th Cir. Unit A 1981). The right to counsel attaches "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967).

See also *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (plurality opinion) ("[t]he narrow focus of harmless-error analysis is not sensitive to th[e] underlying concern" of even the appearance of official partiality).

A "highly improper" and "wholly unnecessary" *ex parte* proceeding at which a trial judge secretly discusses strategy with the government and offers to check the prosecutor's presentation in advance of possible defense objections, and orders that the proceeding be kept secret, taints a trial and cannot be hypothesized away. In criminal cases, attorneys' "presence is essential because they are the means through which the other rights of the person on trial are secured;" it is "the core purpose of the counsel guarantee" of the Sixth Amendment. *United States* v. *Cronic*, *supra*, 466 U.S. at 653, 654, quoting in part *United States* v. *Ash*, 413 U.S. 300, 309 (1973). "But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States* v. *Cronic*, *supra*, 466 U.S. at 656-57 (footnote omitted).

Ex parte meetings between judge and prosecutor in criminal trials "are anathema in our system of justice." *United States* v. *Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987).[19]

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[19] See also *United States* v. *Earley*, 746 F.2d 412, 416 (8th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985), quoting 8B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 43.03[2], at 43-23 (1983):

> "An ex parte communication between a trial court and government counsel '[i]n addition to raising questions of due process . . . involve[s] a breach of legal and judicial ethics. Regardless of the propriety of the court's motives in such a case . . . the practice should be discouraged since it undermines confidence in the impartiality of the court.'"

See also, *e.g.*, *United States* v. *Adams*, 785 F.2d 917, 920 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *People* v. *Loftis*, 55 Ill. App. 3d 456, 467, 370 N.E.2d 1160, 1170 (1977); *State* v. *McGuinn*, *supra*.

> " 'Secret hearings—though they be scrupulously fair in reality—are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.' "

United States v. *Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978). When judge and prosecutor meet secretly to discuss the course of an ongoing trial, "the appearance of fairness so essential to public confidence in the system" [20] vanishes. The substance of impartiality is also destroyed. "[N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." *Haller* v. *Robbins*, *supra*, 409 F.2d at 859. "[J]ustice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).[21]

Far more than appearance, however, is involved:

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[20] *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984).

[21] The court's conduct here was a plain violation of Canons 2 and 3 of the ABA Code of Judicial Conduct; Canon 3 prohibits even nonsubstantive *ex parte* communications unless "require[d]" and "no party will gain a procedural or tactical advantage" and "all other parties" are "promptly" notified and allowed "opportunity to respond." A. 42a. There also was a violation of Rules 3.5 and 8.4 of the Rules of Professional Conduct, and Disciplinary Rule 7-110 and Ethical Consideration 7-35 of the Code of Professional Responsibility. See A. 43a-45a. The latter Code applies to attorneys of the Department of Justice. U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL § 45.735-1(b) (1992). What happened here also is prohibited by Canons 2 and 3 of the new Code of Conduct for United States Judges adopted by the Judicial Conference September 22, 1992. Canon 3 provides in part that a federal judge should "neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." A. 40a-41a. See also 28 U.S.C. § 455(a) (recusal required in any proceeding in which judge's "impartiality might reasonably be questioned").

> "The Due Process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. . . . The neutrality requirement . . . preserves both the appearance and reality of fairness, 'generating the feeling so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) . . . ."

Marshall v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citations omitted). Here the role the judge readily offered to play—reviewing prosecution materials for accuracy, and anticipating defense objections—was one for an attorney for the prosecution. This Court has long held that due process is denied when a judge mixes up the roles of judges and prosecutor. *In re Murchison*, 349 U.S. 133 (1955); see also *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Even a probable-cause determination requires "the detached judgment of a neutral magistrate." *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975).[22]

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[22] "We are not here concerned with whether an ex parte communication *actually* prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question." *Rose* v. *State*, *supra*, 601 So. 2d at 1183 (emphasis in original) (reversing for denial of due process). Certainly little comfort could be taken from the district court's conduct of the rest of the trial. The Court of Appeals pointed out "several incidents in the trial that we quite frankly find disturbing." A. 10a. It was "troubled by the court's questioning of [petitioner] Edelman," and admonished that "[i]mpeaching the defendant is the job of the prosecution, not the court." A. 11a. It was also "disturbed by the district court's conduct" during the cross-examination of a government witness, in which the district court made a comment that "endorsed the government's view" and was "unnecessary and prejudicial," and then "repeated the error moments later." A. 13a, 15a, 14a. *Cf. United States* v. *Earley*, 746 F.2d 412, 416 (8th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985) (referring to the "danger . . . with the 'insidious' nature of a court-prosecutor relationship which would allow such ex parte disclosures").

IV. THE CASE IS IMPORTANT.

Ex parte proceedings are occurring during federal criminal trials with disturbing frequency.[23] See Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*, 74 JUDICATURE 96 (1990). This case is about as extreme a violation as can be imagined, short of outright corruption.

It was bad enough here that the government in a federal felony trial was secretly given "private access to the ear of the court." *Haller* v. *Robbins*, *supra*, 409 F.2d at 859, and that the District Court told the prosecutor to keep the meeting secret. But even more troubling and significant, the reviewing court then looked the other way and affirmed without doing anything to find out the full extent of what had really happened. Other circuits hold most *ex parte* contacts are intolerable; they find out the facts and then if necessary reverse. The Second Circuit instead chants that *ex parte* contacts are intolerable—but then closes its eyes to the facts, and tolerates them.

The Second Circuit's holding here is typical of that circuit's uniquely *laissez-faire* approach to the *ex parte* meetings that apparently occur there regularly as part of the federal criminal trial process. Each time, the Second Circuit typically, as here, delivers a stern lecture, says that this is the last time that it will affirm in the face of such misconduct—and then affirms. Then, when the next *ex parte* violation occurs, the formula is repeated, and the conviction again is affirmed. This has gone on in

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[23] *E.g.*, for recent federal examples, *United States* v. *Swindall*, 971 F.2d 1531, 1541, 1550 (11th Cir. 1992) (holding *ex parte* argument by prosecutor to judge harmless because counts discussed were dismissed); *United States* v. *Walker*, 920 F.2d 513, 516 (8th Cir. 1990) (*ex parte* viewing of evidence in record prior to sentence; affirmed after judge stated there was no conversation with prosecutor); *McKenzie* v. *Risley*, 915 F.2d 1396, 1398 (9th Cir. 1990) (remanded to require evidentiary hearing when special prosecutor met with judge *ex parte* after trial to discuss fee and "may have" discussed other matters); *United States* v. *Minsky*, *supra*.

the Second Circuit for years. *Compare, e.g., United States* v. *Persico*, 349 F.2d 6, 13 (2d Cir. 1965) ("assure that such procedure is not followed in the future") (affirming), *with United States* v. *Schipani*, 362 F.2d 825, 831 (2d Cir.) ("use of this procedure after the date of *Persico* will call for corrective action") (affirming), *vacated on other grounds*, 385 U.S. 372 (1966), *and with United States* v. *Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.) ("such closed proceedings . . . . are fraught with the potential of abuse and, absent compelling necessity, must be avoided") (affirming), *cert. denied*, 439 U.S. 913 (1978), *and with United States* v. *Walsh*, 700 F.2d 846, 857 (2d Cir.) ("[a]n *ex parte* proceeding should not be conducted except in extraordinary circumstances") (affirming), *cert. denied*, 464 U.S. 825 (1983), *and with Penthouse Int'l, Ltd.* v. *Dominion Fed. Sav. & Loan Ass'n*, 855 F.2d 963, 987 (2d Cir. 1988) (civil case condemning "*ex parte* communications between the district court and only one of the litigants") (reversing on other grounds), *cert. denied*, 490 U.S. 1005 (1989). Prosecutors in the Second Circuit have reason to conclude that the rule there is "watch what we do, not what we say."

The basic procedural guarantees of federal criminal defendants should not vary from one part of the country to another. There are no teeth in formal admonitions against *ex parte* meetings between judge and prosecutor if reviewing courts affirm without requiring at least an affidavit from the government as to what occurred, or an explanation from the judge of the scope of and what transpired at the meeting. The Second Circuit's decision sends a message that not only will federal trial judges not be reversed for conducting "highly improper" *ex parte* meetings, no one in that circuit will even be questioned about them. The lesson to federal prosecuting attorneys and even, unfortunately, to district judges, is obvious.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted.

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March 3, 1993

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1600, 1601—August Term, 1991

(Argued July 13, 1992 Decided Oct. 9, 1992)

Docket Nos. 91-1732, -1733

UNITED STATES OF AMERICA,
Appellee,

—v.—

BERNHARD FRED MANKO, also known as Fred;
and JON EDELMAN,
Defendants-Appellants.

Before: ALTIMARI, MAHONEY, and WALKER, *Circuit Judges.*

Appeal from judgment of conviction entered in the United States District Court for the Southern District of New York (Mary J. Lowe, *Judge*) on ground that district court's bias denied defendants a fair trial.

Affirmed.

EARL H. NEMSER (Kathryn L. Hoenig, Gary J. Mennit, Burton Spivak, Cadwalader, Wickersham & Taft, New York, NY of counsel) for *Defendant-Appellant* Manko.

MARION BACHRACH (Carro, Spanbock, Kaster & Cuiffo, New York, NY of counsel) for *Defendant-Appellant* Edelman.

ROBERT J. CLEARY, Ass't U.S. Atty, Southern District of New York (Otto G. Obermaier, U.S. Atty, Miguel A. Estrada, Daniel C. Richman, Ass't U.S. Atty's, Southern District of New York, of counsel) for *Appellee*.

WALKER, *Circuit Judge*:

On February 4, 1991, following a four-month jury trial in the Southern District of New York before Judge Lowe, Bernhard Fred Manko and Jon Edelman were convicted of making and subscribing false tax returns in violation of 26 U.S.C. § 7206(1), aiding and abetting in the preparation of false returns in violation of 26 U.S.C. § 7206(2), and conspiring to violate the tax laws and to defraud the United States in violation of 18 U.S.C. § 371. On November 25, 1991, the district court sentenced each defendant to five years imprisonment and fined each $450,000. On appeal, Manko and Edelman raise a host of objections to the district court's conduct of the trial. In addition, Manko and Edelman assert that the government failed to produce sufficient evidence to sustain their convictions and that prosecutorial misconduct denied them a fair trial.

BACKGROUND

Manko and Edelman were professionals in the once thriving field of tax shelters. In the late 1970s and early 1980s, the two sold interests in partnerships that engaged in complex commodities straddles. These straddles had the effect of creating losses in one tax year and a corresponding gain in the subsequent year, thereby deferring income. *See Gardner v. Commissioner*, 954 F.2d 836 (2d Cir.) (per curiam), *cert. denied sub nom. Falk v. Commissioner*, 112 S.Ct. 1940 (1992).

The straddle business evaporated when Congress passed the Economic Recovery Tax Act of 1981 ("ERTA"), Pub. L. 97-34 (1981). ERTA eliminated the tax benefits of straddles by requiring the taxpayer to recognize both the gain and the loss generated by the straddle in the same year. Manko and Edelman began to look for new tax deferral techniques.

Eventually, Manko and Edelman devised a way around ERTA. They determined that by engaging in repurchase transactions ("repos") in United States Treasury Bills ("T-Bills"), they could create interest deductions in the first tax year and corresponding gains in the second year, with little or no risk. A T-Bill is an obligation of the United States Government to pay a fixed amount (the face value) at a certain date in the future (maturity). T-Bills are purchased at a discount from face value. The interest is determined by the difference between the face value and the purchase price. A repurchase agreement is an agreement to sell a T-Bill and then repurchase the bill at a later date for a predetermined amount. In effect, a repurchase agreement is a loan in the amount of the proceeds of the original sale, collateralized by the T-Bill, with interest equal to the difference between the sale and repurchase prices. A repurchase agreement may expose the parties to market risk, since the agreed-upon repurchase price may be greater or less than the market price of the T-Bill at the agreed-upon date. A repo to maturity exists when the repurchase date specified in the agreement is the maturity date of the T-Bill. In a repo to maturity, there are no economic variables, since the market value of the T-Bill at maturity is always equal to the face value of the T-Bill.

Repos created tax advantages because, until the tax laws changed in 1984, a securities dealer could deduct the interest payments on the loan as they accrued, but only had to report the corresponding gain from the appreciation of the T-Bill at maturity. If the T-Bill matured in

the tax year after the repurchase agreement was made, the taxpayer would be able to defer income equal to the amount of interest accrued in the first year.

One problem with using repos to create tax deductions is that the deduction created in the first year is relatively small compared with the face value of the T-Bill. A repo on a ten million dollar T-Bill would only create a few hundred thousand dollars of interest deductions. Since Manko and Edelman had raised over $25 million from investors with a promise of generating four times that amount in tax deductions, they realized they would have to do huge quantities of repos to maturity.

At trial, the government asserted that Manko and Edelman hatched a fraudulent scheme in order to achieve such volumes. The government alleged that Manko and Edelman appropriated a dormant shell company, TSM Holding Company ("TSMH"), and unilaterally wrote documents to reflect billions of dollars of repos to maturity between TSMH and two clearing brokers controlled by Manko and Edelman—Government Clearing Company and Government Securities Trading Corporation (collectively "GCC"). In turn, Manko and Edelman created documents to reflect mirror transactions between GCC and several investment partnerships, thereby passing on the ersatz tax breaks to numerous unwitting investors. Manko and Edelman represented to their lawyers and accountants that TSMH was an independent entity and that all their transactions with TSMH actually occurred and carried market risk.

The documents introduced at trial described the trades as follows. First, TSMH would sell a T-Bill through GCC to the partnerships. Since TSMH was only a shell company without assets, TSMH would sell the bill short. In a short sale, a party sells a security that it does not own and must therefore find a way to deliver the security to the buyer, such as borrowing it from a third party. Since TSMH sold as much as a billion dollars worth of

T-Bills at a time, the partnerships lacked the funds to pay for the T-Bills. Accordingly, the partnerships would borrow the funds from GCC by entering into a repo to maturity with GCC secured by the T-Bill received from TSMH in the short sale. GCC, of course, did not have a spare billion dollars lying around to lend to the partnerships. Instead, GCC would borrow the funds from TSMH with a repo to maturity secured by the same T-Bill that TSMH had sold short to the partnerships and that the partnerships had loaned to GCC.

The return of the T-Bill to TSMH as collateral cancelled TSMH's obligation to deliver the T-Bill promised in the short sale. Therefore, at the end of the day, GCC would owe TSMH the proceeds of the loan plus interest and TSMH would owe GCC a T-Bill. Both obligations would come due at maturity. GCC would have mirror obligations with the partnerships. The terms of the repurchase agreements between GCC and TSMH exactly mirrored the terms of the agreements between GCC and the partnerships. At the end of the first tax year, GCC would "roll up" the outstanding interest payments on the loan by unilaterally adding them to the principal amount of the loan. The mirror transactions between GCC and the partnerships would proceed with a similar interest roll up, thus allowing the partnerships to take the tax deductions.

GCC set the interest rates on both loans so that the loan proceeds plus interest would exceed the face value of the T-Bill by a set amount—$50 per million at the outset. This money, in effect TSMH's fee for providing GCC with a tax deduction to pass on to the partnerships, was the only thing actually to change hands in the transactions.

The government presented a substantial amount of evidence that the transactions described above never took place—that GCC engaged in typing, not trading. First, from July of 1982 to September of 1982, there was no

one at TSMH with whom Manko and Edelman could negotiate the deals. Vincent Tese and James Sinclair (former partners of Manko) set up TSMH in June of 1982. Neither, however, ever injected any capital into TSMH or used the company in any way. Both denied any knowledge of the transactions between TSMH and GCC. During this period in which nobody controlled TSMH, Manko and Edelman had their trading room staff write up trade tickets that made it appear that TSMH had sold $500 million in T-Bills to GCC and loaned GCC the money to purchase them. GCC prepared but did not send confirmations reflecting the terms of these trades. Edelman admitted that GCC determined the size of the transactions and set the interest rate on the repo without negotiating with TSMH.

In October of 1982, perhaps in an effort to provide more substantial documentation of the "trades," defendant Manko hired Richard Bandel, a former employee of GCC, to work at TSMH. At Manko's instruction, Bandel picked up the confirmations that GCC had printed and logged into accounting ledgers all the trades that had been written up to that point. With Bandel in place at TSMH, GCC began sending trading confirmations to TSMH, and Bandel logged these transactions into TSMH's books. The defendants admitted that even with Bandel in place, GCC did not negotiate the terms of the transactions with TSMH.

At about the same time that Manko placed Bandel at TSMH, Tese and Sinclair transferred TSMH, free of charge, to Robert Maurus and Charles Genovese. Maurus testified that he did not even learn that Bandel worked at TSMH until March of 1983. Genovese testified that Manko informed him that TSMH needed Bandel in order to make TSMH "look like a real company."

After the transfer, Maurus and Genovese remained largely unaware of the details of the alleged transactions.

On redirect examination, Maurus conceded that he understood nothing about the transactions except that GCC wrote up the paper and TSMH received a fee. It was not until the Spring of 1983 that TSMH began to send reciprocal confirmation slips to GCC. By the time these confirmation slips were sent, most of the underlying T-Bills had already matured and the parties' obligations had already been settled. Genovese testified that these confirmation slips were sent for "cosmetic" reasons.

The pace of the transactions accelerated in November of 1982. Faced with the need to create almost $100 million in deductions by the end of the year, Edelman ordered John Mann, the chief trader for GCC, to write up $500 million and $1 billion transactions with TSMH. Edelman instructed Mann to set the price without contracting TSMH. Mann refused, with the explanation that he did not participate in transactions in which he did not speak to the other party. Eventually, Mann agreed to limited participation in the transactions, informing other trading room employees of the market price for T-Bills so that the correct amounts could be written on the trade tickets.

One GCC trading room employee testified:

> Right after the first billion dollars was decided on, it was just quiet right after, and then Joe Bryant [a trading room employee] said "this is the one that's going to get them." And John Mann and [another employee] and myself all agreed to that, and a few minutes later John Mann said, "it's gone too far now. The boys have gone too far."

At other times, trading room employees referred to the billion-dollar trades as "the straw that's going to break the camel's back." Employees also discussed the financial reward for turning Manko and Edelman in to the IRS.

After the first three days of the billion dollar trades, Mann informed Edelman that he "had legal reservations

about these trades and didn"t want to do them anymore." Mann testified that Edelman replied that the trades were "*none of* [Mann's] *concern*" and "that it was not [Mann's] job to be policeman for the world."

In fifteen days in November of 1982, GCC wrote $25 billion worth of T-Bill repurchase transactions with TSMH. After that, the pace of the scheme slackened, but GCC continued to write repurchase transactions until the tax laws changed in 1984. At the time of the billion dollar trades in November of 1982, TSMH had $33 in cash, $50 in office expenses, and no telephone bills. TSMH did not even have a bank account until the end of that month.

Eventually, Barbara Kanter, Edelman's personal assistant, opened an account for TSMH. Kanter then transferred millions of dollars into and out of TSMH's account. The defense alleged at trial that this money reflected interest payments from GCC to TSMH. However, Edelman acknowledged on cross-examination that he could not correlate any particular payment to interest owed on any loan. When Maurus and Genovese learned in the spring of 1983 that Kanter had been transferring money into and out of their account, they made no efforts to stop her. Genovese explained at trial that he felt the money did not belong to TSMH.

Faced with this powerful evidence that the purported transactions were shams that never took place, the defense contended at trial that TSMH had granted GCC discretion to make trades on TSMH's behalf, and thus that there was no need for GCC to seek TSMH's approval of the terms of the repo transactions. The defense never presented any direct evidence of such an agreement apart from Edelman's testimony that Manko told him that TSMH had granted GCC discretion to make trades.

The defense further argued that there was nothing strange about a corporation with no assets making billions

of dollars of loans because it was common in the government securities markets for undercapitalized entities to engage in highly leveraged, low-risk transactions.

The trial also proceeded on a second front. The government argued that even if the jury were to determine that the transactions actually occurred, the transactions were devoid of risk and thus lacked economic substance. Accordingly, the government contended that the transactions could not form the proper basis for tax deductions. The defense countered that so long as the repurchase loan represented a real debt, interest paid on that debt could be deducted even if the transactions as a whole lacked economic substance. The court sided with the government and charged the jury that it could convict if it found either that the transactions did not occur or that they lacked economic substance.

The trial in this extremely complex matter took four months. At the close of trial, the jury convicted Manko and Edelman on all counts. After the jury returned the verdict, the district court gave the jury a supplemental interrogatory that asked the jury to indicate whether it concluded that the transactions never took place or that the transactions lacked economic substance. After deliberating briefly, the jury announced that it had determined that the transactions never took place. This appeal followed.

DISCUSSION

On appeal, Manko and Edelman principally challenge the district court's handling of the trial. They contend that the court questioned witnesses in a way that suggested disbelief of the defendants' position, improperly held an *ex parte* conference with the prosecutor near the end of the trial, permitted the prosecutor to make improper comments in summation, and issued confusing instructions to the jury. Defendants suggest that the combined force of these asserted infirmities denied them a fair trial.

A. The Trial Court's Conduct

The district judge took an active role in the trial of this case, asking numerous and probing questions of witnesses. Such conduct is unquestionably proper—indeed, often required—in extremely complex cases. *United States v. Gurary*, 860 F.2d 521, 527 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *United States v. DiTommaso*, 817 F.2d 201, 221 (2d Cir. 1987); *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985). However, such questioning carries with it the risk that the judge will appear partial to one side or the other. In order to avoid the appearance of partiality, a trial judge should limit questioning to inquiries necessary to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings. *United States v. Mazzilli*, 848 F.2d 384, 388 (2d Cir. 1988).

The fact that a judge asks a question the purpose of which is not so limited will not always require reversal. Judges are human, and it is inevitable that in the course of long, complex, and hotly contested trials, a judge may on occasion react intemperately. A defendant is not entitled to a perfect trial, only a fair one. *United States v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). Our ability to discern from a cold record whether particular statements of a trial judge rendered the trial unfair is quite limited. "[I]t is difficult to glean tone of voice, whether sarcastic or neutral, facial expression, whether reflecting disbelief or sober thoughtfulness, or physical demeanor, whether self-contained or expressing opinion and emotion. Therefore, it is only after an examination of the entire record that we can come to a conclusion about the conduct of the district court." *Mazzilli*, 848 F.2d at 389 (2d Cir. 1988).

The defendants point to several incidents in the trial that we quite frankly find disturbing. Nonetheless, after a careful review of the entire record, we conclude that

the district court's conduct did not deny defendants a fair trial.

1. *The District Court's Questioning of Jon Edelman*

A district court must show particular restraint in questioning a criminal defendant during the defendant's direct testimony. At this critical phase of the trial, the court must scrupulously insure that its questions do not indicate that the court doubts that the witness is telling the truth. *Mazzilli*, 848 F.2d at 388-89; *United States v. Victoria*, 837 F.2d 50, 55 (2d Cir. 1988). Impeaching the defendant is the job of the prosecution, not the court.

Here, the district court vigorously interceded in Edelman's testimony. Most of the court's questioning took the form of inquiry into precise details of the transaction. The court repeatedly sought to clarify whether GCC had made certain payments to TSMH in cash or by book entry. While the relevance of this distinction to whether the transactions took place or had economic substance is not entirely clear, our view upon reading the record is that the court's questions were aimed at pinning down this factual issue, not at casting doubt on defendant Edelman's credibility. Accordingly, we think this portion of the court's questioning of Edelman was proper.

We are more troubled by the court's questioning of Edelman with regard to financing arrangements between GCC and the investor partnerships. At one point, Edelman compared GCC's willingness to enter into a repurchase agreement with an investor partnership to allowing a customer to purchase securities on margin. The court asked a series of questions that undermined the analogy:

> [Edelman]: Yes, there is financing here and the best analogy I could make simply is to a financing on a margin account where you might have 100 shares of IBM you paid for, no money in your ac-

count, but fully paid for and you want to buy another 100 shares. You can do that.

The Court: Yes, you can, but if it's called you are expected to pay.

Edelman: If there is a margin call.

The Court: Yes.

[Edelman]: And the same thing is here, if my equity declines—

The Court: At any time in these whole 2 years we are talking about, did GCC or TSM ever call upon any of these partnerships to put money on any of these financing transactions?

[Edelman]: Can I answer that generically first?

The Court: Any way you want to.

[Edelman]: When an account at GCC has deficit equity, that is, that its value is less than the amount that it has borrowed, it has deficit equity, then GCC would be in a position to ask for more money. It may ask for more money, it may not.

The Court: That isn't my question. This is 1990. We are seven years down the road of the last transaction. In any of those two years, '82 or '83, did GCC or TSM ever ask any of these partnerships to put up money such as you were talking about a margin call in a stockbroker's account?

[Edelman]: With respect to the financing repo to maturity transactions, no other transactions?

The Court: Yes.

[Edelman]: I don't think so. GCC would be the person who would ask for money and I don't recall any situation where that was required.

[The Court]: That is the question I was asking.

By forcing Edelman to conceed that GCC never made a margin call, the court discredited Edelman's analogy to ordinary brokerage accounts. By undermining Edelman's testimony in this fashion, the court may have cast some doubt on Edelman's credibility. We note, however, that the court's questioning related to a collateral issue and

that Edelman's lawyer, upon resuming questioning, elicited testimony explaining that GCC would never need to make a margin call because the securities held as collateral for the repos, the T-Bills, were by their very nature always increasing in value as maturity approached. Thus, any doubts raised by the court's questions were quickly dispelled. While the court should not have challenged Edelman's analogy, since the challenge reflected as much on credibility as it did on factual clarification, we do not think this incident undermined the fairness of the trial.

2. *The Bandel Cross-examination*

We are also disturbed by the district court's conduct during the cross-examination of Richard Bandel, who testified for the government. The government's theory was that Bandel had been placed in TSMH by Manko to record the paper transactions in TSMH's books and that Bandel had no substantive role in determining the dimensions of the transactions.

The defense sought to discredit the government's view of Bandel's role in several ways. First, the defense asked Bandel to explain his testimony that Manko had hired him at TSMH in light of Bandel's prior statement in an affidavit that someone other than Manko had hired him to work at TSMH. Bandel, with some prodding from the district court, indicated that he stood by his testimony in court and that his present recollection was more accurate than that found in his prior affidavit. The defense also asked Bandel about his view of the transactions, perhaps in an effort to show that Bandel had some role in negotiating the deals:

> Q. [The Prosecutor] asked you about the large trades that occurred in November of 1982.
>
> A. Yes, he did.
>
> Q. And it's your testimony that you viewed those trades no differently than any others?
>
> A. Just that I was told—

The Court: By whom?

The Witness: By Joe Bryant, usually the day before I would get the ticket, that there were large tax trades going through.

Q. And it's fair to say the word "tax trade" was used openly?

A. Yes.

Q. And that based on your experience on Wall Street that many trades had a tax component?

Mr. Robinson: Objection.

The Court: This man was a scrivener, he wasn't a policy maker.

While prosecutor Robinson's objection was well taken, in that Bandel had not been qualified as an expert, the court's observation that Bandel "was a scrivener" was unnecessary and prejudicial. The government's theory was that Bandel was a scrivener, and evidence in the record supports this view. The district court, however, should not have endorsed the government's position.

The court repeated the error moments later:

Q. Did you ever tell Mr. Maurus or Mr. Genovese that you had any problems with these trades?

The Court: He has told us that when he found there might be errors, he spoke to Mr.—who did you sepak to about the errors in calculating the fees?

The Witness: The financing, Joe Bryant.

The Court: And Mr. Bryant and you got together and corrected whatever errors?

The Witness: Yes.

Q. My question was, did you ever tell Mr. Maurus or Mr. Genovese, when they took control of TSM Holdings, that you had any problems or concerns about these trades?

The Court: What kind of problems are you talking about? The man was a scrivener. That's the third time I repeated it. He knew nothing about the underlying transaction, and you're not going to

> ask questions to give the inference that he did when he has told you repeatedly he did not know.

The court thus explicitly and repeatedly endorsed the government's view of Bandel's role. Such a breach of impartiality is a matter of grave concern.

We cannot, however, conclude that the court's conduct denied Manko and Edelman a fair trial. First, defendants did not argue to the jury that Bandel negotiated the transactions. In closing argument defendants all but adopted the court's characterization, impeaching the accuracy of Bandel's testimony by stressing that after leaving Wall Street, Bandel went to work as a part-time starter at a golf course. Thus, defendants do not really dispute the accuracy of the scrivener label.

Second, the court properly instructed the jury that the jury's view of the evidence controlled, regardless of what the court said:

> With respect to factual matters, it is your recollection that controls. Nothing that counsel for either the government or the defendant may have said with respect to matters of evidence, either in their openings or in their summations, is evidence in this case; nor are any remarks that I may make during the course of this charge, or have made during the course of the trial—that is not evidence.
>
> * * *
>
> I remind you again that nothing I may have said, even my questions to witnesses during the trial when they were on the stand, those questions should be given no undue weight for their sole purpose was to clarify and aid you in understanding what the content of the testimony was to be. So you are to place no undue weight, one way or another, on the fact that I may have asked questions of witnesses.

In light of this extensive instruction and the fact that the court's statement concerned what proved to be an un-

contested issue, we do not think that the court's error denied Manko and Edelman a fair trial.

In sum, our review of the transcript confirms that on a few occasions the court crossed the line in questioning witnesses. In the context of a four month trial, we think the court's conduct did not indicate to the jury that the court believed that the prosecution should win. Accordingly, we reject defendants' contention that the trial court's conduct denied them a fair trial.

B. The *Ex Parte* Conference

Towards the end of the government's summation, one prosecutor initiated a conference with the district court, without the defense team. The conference was transcribed, but the district court sealed the record of the conference and refused to unseal the transcript until after the government's rebuttal summation. In this *ex parte* conference, the prosecutor advised the district court of his plan to use a chart in the rebuttal summation:

> The Court: What is it you have handed me, Mr. Cleary?
>
> Mr. Cleary: Judge, I just handed you a document I typed up headed "Excerpts of testimony." It lists witness's names and either quotations or paraphrases of their testimony. It's what I propose to use. It's a mockup of a chart I propose to use in my rebuttal summation.
>
> I bring this to you ex parte because I didn't want to let the defense know at this time before they sum up exactly what I am proposing to do in my rebuttal and I did want to apprise the court that I am planning on doing this so that your Honor could allot whatever time is necessary between the end of the last defense summation and the beginning of the rebuttal summation should there be objection to this. Because at that time I propose to give the defense

a copy of this mockup which contains references to the page of the transcript.

I should add, Judge, if you think it's more appropriate to disclose this information to them now, although I prefer not to I, of course, would go along with that.

The Court: No, I don't think you should disclose it. What I will do is I will check the places that you expect to use quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use.

Mr. Cleary: Thank you, Judge.

The Court: All right.

At the close of the defense summation, the government informed the defense of its intent to use the chart on rebuttal, and the court allowed the defense forty-five minutes to review the twenty-eight quotations and paraprases in the chart for accuracy. Defendants objected to the use of the chart and requested surrebuttal, but did not point to any specific inaccuracies in the chart. The court overruled defendants' objection and denied the request for surrebuttal. On appeal, the defendants assert that the *ex parte* conference denied them due process.

We note at the outset our inability to fathom why the prosecutor would jeopardize a four month trial with a wholly unnecessary *ex parte* conference. Such conferences "should not be conducted except in extraordinary circumstances." *United States v. Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983). No such extraordinary circumstances are present here.

The government lamely contends that the conference was for a proper purpose—to advise the district court of the government's plan to use a chart so that the court could allot proper time for argument between the defense summations and the government's rebuttal summation. But if that were all that the government wished to accomplish in the meeting, then there would have been no

need to show the court the chart the government planned to introduce. The government could have indicated, with defense counsel present, that it likely would have a chart in rebuttal which would require prior review. The only purpose for showing the court the precise quotes the government wished to use was to enable the court to review the chart for accuracy before the defense had an opportunity to present any arguments to the court. In short, the prosecution initiated this *ex parte* proceeding in a blatant attempt to win a tactical advantage, to get a "leg up." Unhappily, the district court went along with the prosecution.

That this *ex parte* conference was improper and unnecessary does not, of course, establish reversible error. *United States v. Persico*, 349 F.2d 6, 13 (2d Cir. 1965). Rather, "[t]he fact that such a meeting occurs . . . does not require reversal if it does not affect the fairness of the trial." *Walsh*, 700 F.2d at 858; *see also United States v. Moten*, 564 F.2d 620, 630 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977).

Defendants do not point to any inaccuracies in the chart. Nor do defendants identify any way in which the chart went beyond the scope of proper rebuttal. *Cf. United States v. Giovanelli*, 945 F.2d 479, 493-96 (2d Cir. 1991) (Newman, J., concurring). Defendants' contention that a chart prepared before the defense summation is necessarily beyond the scope of rebuttal is unpersuasive. The quotations reflected on the charts were all central to the case. The government could easily predict that defense summation would tread the same ground as the quotations. Thus, we are convinced that the district court acted properly in allowing the government to use the chart.

Of course, the propriety of using the chart cannot be the measure of whether the *ex parte* proceeding constituted reversible error. Otherwise, the fact of an *ex parte* proceeding would be irrelevant so long as the court ulti-

mately made the right ruling. Such a rule would not properly reflect our deep distrust for one-sided proceedings. Here, however, two facts convince us that reversal is not required. First, because the chart was clearly accurate and within the scope of rebuttal, there is no reason to believe that the district court would have ruled differently absent the *ex parte* conference. Moreover, even if the conference did influence the judge's decision to allow the chart, in the context of this four month trial, we doubt that this chart highlighting damaging testimony played even a minimal role in influencing the jury verdict. The prosecution presented substantial evidence that the transactions with TSMH never occurred. The chart at issue did not present any new information or any information that could not have been conveyed easily to the jury without the chart. Accordingly, we conclude that this highly improper *ex parte* conference does not constitute reversible error.

C. The Jury Instructions

Defendants raise a series of objections to the court's instructions to the jury. Principally, defendants argue that the court should have given all of the proposed charges submitted to the court by the defense on the afternoon of the charging conference. Most of the proposed charges concerned tangential legal issues that the government never disputed. In this lengthy trial, the court properly avoided burdening the jury with this extraneous information. Accordingly, we find most of defendants' contentions meritless. Defendants do raise three objections to the charge that warrant discussion.

1. *Ratification*

The defense argued at trial that the transactions between TSMH and GCC were real and binding even if TSMH did not grant discretion to GCC to perform trades, because TSMH subsequently ratified GCC's trading. The

district court, as part of a general charge on defense contentions, instructed the jury that "the defendants contend that TSM Holding ratified all transactions by subsequent conduct." The defense requested an additional instruction defining ratification. The court refused to give the proposed instruction. Defendants assert this refusal constitutes reversible error. We disagree.

A court may properly refuse to give a charge that fails to accurately state the law. *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 3029 (1992). Here, defendants' requested charge stated that TSMH could ratify the acts of GCC "either by sending back confirmations to GCC, by failing to object to the transactions after TSMH received confirmations from GCC, or by any other conduct, such as recording the transactions as if they were done, indicating an intention to be bound by the transactions." The problem with this proposed charge is that under New York law, "[a]n agent's acts that are not valid unless performed pursuant to writing can only be ratified in writing." *Weston Associates, Inc. v. Niagara Properties, Inc.*, 130 A.D.2d 964, 965, 516 N.Y.S.2d 381, 382 (4th Dept. 1987). Here, the acts of the purported agent, GCC, contracting for the purchase of securities, would not be valid absent "some writing signed by the party against whom enforcement is sought." N.Y.U.C.C. § 8-319(a). Accordingly, TSMH could ratify GCC's authority only through a writing. The defendants' proposed instruction suggesting that TSMH could ratify through any conduct indicating an intent to be bound by the transactions failed to state New York law accurately. The district court correctly refused to give the proposed instruction.

2. *Economic Substance*

Defendants claim that they were prejudiced by a reversal by the trial court during the course of the trial on the issue of the proper definition of economic substance.

On the eve of trial, the court ruled that if the transactions were not "economically substantive indebtedness," the interest would not be deductible. Defendants claim that the trial court, at this time, rejected a two-part test for economic substance advanced by the government, instead adopting an open definition of economically substantive indebtedness, but then reversed itself in its charge to the jury by adopting the two-part test previously rejected. The two-part test with which the court charged the jury stated, in accordance with our decision in *United States v. Atkins*, 869 F.2d 135, 139-40 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989), that a transaction lacks economic substance if it lacks a reasonable possibility of profit and lacks market risk. Defendants contend that the ambiguous term "economically substantive indebtedness" adopted on the eve of trial would encompass purely formal indebtedness, and that they relied on this notion in presenting their case. The defendants claim that this reversal constitutes a violation of the law of the case doctrine and they were prejudiced by it, since they relied on the earlier ruling in formulating their trial strategy.

While a trial court's reversal of its own ruling during the course of a trial may raise serious issues of prejudice, *see United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991), we doubt whether such concerns are raised here. Our review of the trial record suggests that, at the outset of the trial, the judge's ruling was limited to acknowledging that the question of economic substance was an issue in the case after first saying off the record that it would not be an issue. The judge did not provide the parties with a precise definition of economic substance until her instructions to the jury, when she employed the two-prong test of *Atkins*. On the eve of trial, the judge simply noted that the defense objected to the government discussing profit motive and market risk, but stated to the parties that in establishing whether or not there was economically substantive indebtedness, the parties

may present "whatever factors you believe are relevant in order to reach that legal conclusion . . . ." In light of this, the eventual jury charge defining economic substance as profit potential or market risk does not appear to us to constitute a reversal of a prior decision.

In any event, we need not decide whether there was a prejudicial reversal of a prior ruling of law by the trial court. In the special interrogatory, the jury found that the transactions "were fictitious and did not take place." That finding rendered the jury's understanding of the term "economic substance" irrelevant to the outcome.

3. *Prearranged Transactions*

Defendants contend that the court's charge implied that prearranged transactions are necessarily fictitious. Defendants argue that since all repurchase transactions are in some sense prearranged—in that the borrower sells the security to the lender and agrees in advance to repurchase the security at a later date for a set price—the court's charge effectively forced the jury to conclude that the transactions were fictitious.

Defendants focus particularly on the court's instructions with respect to the knowledge element of the filing false returns charge. The court advised the jury that the government did not have to prove actual knowledge. Instead, the court stated:

> you may find that a defendant knew that the transactions *were a sham* or *without economic substance* if you find, 1, that the defendant you are considering was aware of a high probability that the transactions *did not take place* or *were prearranged* and, 2, that the defendant acted with deliberate disregard for how or whether those transactions were carried out with a conscious purpose to avoid learning the truth on this subject. (emphasis added)

The defendants argue that this charge equated transactions that "did not take place" with transactions that "were prearranged."

However, we think the more natural reading of the above passage is that it equates transactions that "did not take place" with transactions that "were a sham" and equates transactions that "were prearranged" with transactions "without economic substance." Viewed in this light, we doubt the court's instructions prejudiced defendants. Elsewhere in the instructions the court advised the jury that "transactions may be arranged in an attempt to minimize taxes" and expressly stated that in order to lack economic substance, a transaction must "lack[] a reasonable possibility of profit apart from tax deductions, and . . . lack[] market risk."

More importantly, even if the charge confused the jury on this point, we are unable to see how this confusion prejudiced defendants, for the same reason that we find that defendants could not have been prejudiced by the trial court's alleged reversal on her instructions on economic substance. As noted above, the jury expressly found that the transactions "were fictitious and did not take place." This response to the special interrogatory removed the economic substance issue from the case. Any lingering confusion about whether prearrangement was synonymous with a lack of economic substance was irrelevant to the verdict. Accordingly, we reject defendants' challenges to the jury instructions.

Finally, defendants assert that the government failed to produce sufficient evidence to support the conviction and that prosecutorial misconduct in summation denied them a fair trial. We have considered these and the remainder of defendants' arguments and find them to be without merit.

CONCLUSION

The trial in this case challenged the resources of the district court. Through the months of testimony and the thousands of documents, the district court grappled with vigorous and experienced defense counsel and diligently struggled to ensure that the jury could follow the evidence and render a fair verdict. Not unexpectedly in a long trial, the court made some mistakes, and defendants did not receive a perfect trial. However, our thorough review of the entire record convinces us that the defendants did receive a fair one.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Dec. 4, 1992]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of December one thousand nine hundred and ninety-two.

Docket Number: 91-1732
91-1733

UNITED STATES OF AMERICA,
Appellee,

v.

BERNHARD FRED MANKO, also known as FRED; and
JON EDELMAN,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant Jon Edelman

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

By: Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANT JON EDELMAN

Docket No. S89CR91-02(MJL)

[Filed Dec. 2, 1991]

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government ROBERT CLEARY the defendant appeared in person on this date 11/25/91 [X] WITH COUNSEL MICHAEL F. ARMSTRONG

FINDING AND JUDGMENT

There being a finding/verdict of [X]GUILTY. Defendant has been convicted as charged of the offense(s) of

Title 18, Section 371
Title 26, Section 7206(1)
Title 26, Section 7206(2)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count I Three years imprisonment, a fine of $250,000.00, $50.00 spec. ass. fee

Count two through seven and thirteen through twenty-eight One year imprisonment and a $50.00 spec. ass. fee on each count, sentences of imprisonment are concurrent with each other and concurrent with Count I.

Count twenty-nine One year imprisonment a fine of $100,000.00 $50.00 spec. ass. fee To run consecutive to sentence on counts one, two through seven and thirteen through twenty-eight.

Count Thirty One year imprisonment a fine of $100,000.00 $50.00 spec. ass. fee To run consecutive to sentence on counts one, two through seven and thirteen through twenty-eight and twenty-nine.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

s Mary Johnson Lowe
HON. MARY JOHNSON LOWE

Date 11-26-91

APPENDIX D

[6578] SEALED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 89 Cr. 91

UNITED STATES OF AMERICA

v.

BERNARD F. MANKO, a/k/a "Fred"
and JON EDELMAN,

Defendants.

January 29, 1991
10:00 a.m.

Before:

MARY JOHNSON LOWE,

District Judge

(Robing room conference)

THE COURT: What is it you have handed me, Mr. Cleary?

MR. CLEARY: Judge, I just handed you a document I typed up headed "Excerpts of testimony." It lists witness' names and either quotations or paraphrases of their testimony. It's what I propose to use. It's a mockup of a chart I propose to use in my rebuttal summation.

I bring this to you ex parte because I didn't want to let the defense know at this time before they sum up exactly what I am proposing to do in my rebuttal and I did [6579] want to apprise the court that I am planning on doing this so that your Honor could allot whatever time is necessary between the end of the last de-

SEALED

fense summation and the beginning of the rebuttal summation should there be objections to this. Because at that time I propose to give the defense a copy of this mockup which contains references to the page of the transcript.

I should add, Judge, if you think it's more appropriate to disclose this information to them now, although I prefer not to I, of course, would go along with that.

THE COURT: No, I don't think you should disclose it. What I will do is I will check the places that you expect to use quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use.

MR. CLEARY: Thank you, Judge.

THE COURT: All right.

SEALED

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 89 Cr. 91

UNITED STATES OF AMERICA

v.

BERNARD F. MANKO, a/k/a "Fred"
and JON EDELMAN,
Defendants.

January 30, 1991
10:00 a.m.

Before:

MARY JOHNSON LOWE,
District Judge

* * * *

[6824] MR.RITHOLZ: Your Honor, I just was shown the transcript for January 29, yesterday, which starts out pages 6578 and 6579 sealed.

MR. CLEARY: That was my conference with your Honor. I don't mind having that unsealed as soon as Mr. Ritholz completes his summation.

THE COURT: All right. Everything I do is on the record one way or another. You will see it as soon as you are finished.

MR. RITHOLZ: You don't think I should know it now before I finish summing up?

THE COURT: No.

MR. RITHOLZ: I won't suffer a prejudice.

THE COURT: The prejudice you will suffer will not be caused by what is sealed, all right?

[6825] MR. RITHOLZ: I must say I don't understand, but if that is your Honor's ruling—

THE COURT: There is no causal relationship between what is sealed and prejudice.

I wouldn't do that, Mr. Ritholz.

(Trial adjourned to January 31, 1991 at 10 a.m.)

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 89 Cr. 91

UNITED STATES OF AMERICA

v.

BERNARD F. MANKO, a/k/a "Fred"
and JON EDELMAN,

Defendants.

January 31, 1991
10:00 a.m.

Before:

MARY JOHNSON LOWE,

District Judge

* * * *

[6940] (Open court; jury not present)

MR. RITHOLZ: I have an application.

THE COURT: Yes.

MR. RITHOLZ: This is an application with respect to certain material we were just shown for use by the government, which the government intends to use on rebuttal.

To be accurate—I have written this out—at first I asked that the court unseal the ex parte transcript—

THE COURT: Counsel, we can take this up after the rebuttal is completed.

MR. RITHOLZ: No, your Honor. I am opposing the use of this material, and I would like to get this on the record.

I think this is most important.

THE COURT: Go ahead, please state it as succinctly as possible; it's 5:30 now.

MR. RITHOLZ: I have been writing it out carefully, your Honor.

After completion of both defense summations, at 4:45 p.m. on January 31, defense is surprised with charts containing 28 quotations from the record, many not verbatim, and many not complete, and which has taken us this full hour just to try to verify.

This surprise, which we characterize as unfair, [6941] is a denial of due process in more than one way. It is unfair and incorrect procedure in that the court apparently heard an application for leave to do this ex parte on Tuesday morning, 12/29, even before defense summation commenced, and while the prosecution summation was under way, and gave an advisory opinion.

In the first place, fairness requires the prosecution to make an application on notice in open court with opportunity for the defense to make objection with oral argument, without the prosecution knowing in advance and ex parte the court's ruling, a ruling made without benefit of hearing both sides.

The charts are outside the scope of proper rebuttal. The court ruled on a scope-of-rebuttal question before defense summation had started and while prosecution summation was still under way.

THE COURT: Counsel, if you knew what the record was, you wouldn't be making these statements, but go ahead.

MR. RITHOLZ: This can be taken as directed to this in any event.

All of the material was available for use in prosecution summation and could have been included, and it should have been in order to give defendants fair opportunity to counter it and to avoid ambush.

This material is not proper rebuttal but yet [6942] another pre-planned summation and violated the rule against saving material for rebuttal.

I believe Judge Knapp precluded this very kind of conduct in U.S. against Friedman in 1986. We haven't had a chance to find the case for you, your Honor.

I want to give you just one example of what can happen here, and I don't know if it will. For our summation, defense summations, we had no particulars of the indictment on the question of secret oral agreement. Mr. Robinson spent no time on the issue of secret oral agreements leaving us, defendants, unable to sum up on it with particularity.

Any rebuttal on that subject would be entirely improper.

THE COURT: That is why I asked you to save this until afterwards because this is just conjecture that has no basis in fact.

MR. RITHOLZ: We are objecting to these very charts. I could have summed up on this, and this was available and they should have put it into his summation.

THE COURT: Summed up on what?

MR. RITHOLZ: On what they are quoting.

THE COURT: Do you know what is on the charts?

MR. RITHOLZ: Sure. We were shown it just notice [*sic*]. That is just against the rule of rebuttal.

[6943] THE COURT: We'll leave it until after the rebuttal is completed and the jury has gone home, and I will make my ruling and listen to any further argument.

Bring the jury in.

MR. RITHOLZ: Will he be permitted to show this to the jury?

THE COURT: Of course he will.

MR. RITHOLZ: But I object to that.

THE COURT: It's very clear on the record.

(Jury present)

THE COURT: Be seated, please.

Mr. Cleary.

MR. CLEARY: Thank you, your Honor.

Ladies and gentlemen, I am going to try—I'm going to try—to be brief in my rebuttal summation, and I am going to be very, very blunt.

* * * *

[6945] What I'm going to do during the course of my rebuttal summation is I'm going to put up on this chart which is headed "Excerpts of testimony of certain portions of the trial record," either paraphrasing testimony or [6946] quoting it verbatim.

The first one we have is Barry Lyman. "Mr. Manko said that there were so many other transactions, quote, that it would become impossible for anyone to come in and trace the tax trades.

MR. RITHOLZ: I object. The quote is not accurately quoted.

MR. CLEARY: That is one example.

MR. RITHOLZ: Objection.

THE COURT: Mr. Cleary, get the record and read the record.

MR. CLEARY: There is a word missing, which I'll add right now, which is "almost." The quote from the transcript at 557 is that I, Barry Lyman, was—

THE COURT: Read the question and the answer.

MR. CLEARY: Line 6.

"Q. Did Mr. Manko say what effect, if any, that would have, that is, the number of transactions that would be on the books of the partnerships?

"A. Yes. I was told that it would become almost impossible for anyone to come in and trace the tax trades" says Barry Lyman.

* * * *

[6985] MS. CHEPIGA: Objection to the last quotation that was put up. It misstates the record.

THE COURT: All right. Mr. Cleary.

MR. CLEARY: I will correct it, Judge.

* * * *

APPENDIX G

U.S. Department of Justice

[SEAL]

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

February 28, 1991

BY HAND

Honorable Mary Johnson Lowe
United States District Judge
United States Courthouse
Foley Square
Room 803
New York, NY 10007

Re: *United States v. Bernhard F. Manko and Jon Edelman*
S 89 Cr. 91 (MJL)

Dear Judge Lowe:

I am writing this letter to let Your Honor know that the Government has no objection to the Court unsealing trial transcript pages 6578-6579, transcribed on January 29, 1991, in the above-referenced case.

Respectfully,

OTTO G. OBERMAIER
United States Attorney

/s/ Stephen Craig Robinson
By: STEPHEN C. ROBINSON
Assistant United States Attorney
Tel.: (212) 791-1951

cc: Kathryn L. Hoenig, Esq.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, New York 10038

APPENDIX H

CONSTITUTIONAL PROVISIONS, RULE, AND CODE PROVISIONS INVOLVED

I.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

III.

Rule 43 of the *Federal Rules of Criminal Procedure* provides:

> Presence of the Defendant
>
> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or
>
> (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.
>
> (c) Presence Not Required. A defendant need not be present in the following situations:
>
> (1) A corporation may appear by counsel for all purposes.
>
> (2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

IV.

The Code of Conduct for United States Judges, adopted by the Judicial Conference September 22, 1992, provides in part:

CANON 2. A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities*

* * * *

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as

authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a distinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

V.

The American Bar Association's Code of Judicial Conduct provides in part:

CANON 2. A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

CANON 3. A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of

the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. *Adjudicative Responsibilities*

* * * *

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers

in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

VI.

The American Bar Association's Model Code of Professional Responsibility provides in part:

Disciplinary Rule 7-110 Contact with Officials

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

* * * *

Ethical Consideration 7-35. All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not com-

municate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

VII.

The American Bar Association's Model Rules of Professional Conduct provide in part:

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

* * * *

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Supreme Court, U.S.
FILED
JUN 7 1993
OFFICE OF THE CLERK

Nos. 92-1134 and 92-1448

In the Supreme Court of the United States

OCTOBER TERM, 1992

JON EDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

BERNHARD F. MANKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

ROBERT E. LINDSAY
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QUESTIONS PRESENTED

1. Whether an *ex parte* contact between a district judge and a prosecutor that does not result in prejudice to a defendant requires reversal of a criminal conviction.

2. Whether the district court properly instructed the jury on the element of willfulness.

3. Whether the jury's response to a special interrogatory rendered irrelevant any error in the district court's instructions regarding the deductibility of interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1434

JON EDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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BERNHARD F. MANKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25)[1] is reported at 979 F.2d 900.

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[1] Except as otherwise indicated, all references herein to "Pet. App." are to the appendix to the petition for certiorari in No. 92-1448.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1992. Petitions for rehearing were denied on December 4, 1992. Pet. App. B1; 92-1434 Pet. App. 25a. The petition for a writ of certiorari in No. 92-1434 was filed on March 3, 1993. The petition for a writ of certiorari in No. 92-1448 was filed on March 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner Edelman was convicted on eight counts of knowingly and willfully making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1); 16 counts of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2); and one count of conspiring to defraud the United States by generating false and fraudulent tax deductions, in violation of 18 U.S.C. 371. Petitioner Manko was convicted on two counts of knowingly and willfully making and subscribing false tax returns; 21 counts of aiding and assisting in the preparation of false returns; and one count of conspiracy to defraud the United States by generating false and fraudulent tax deductions. Petitioners were each sentenced to five years' imprisonment and a $450,000 fine. The court of appeals affirmed.

1. a. Petitioners developed a tax shelter that purportedly used repurchase transactions (repos) in United States Treasury Bills (T-Bills) to generate interest deductions in the first tax year and corresponding gains in the subsequent year, with little or

no risk. Petitioners raised over $25 million from investors and promised to generate four times that amount in deductions. Because the interest deduction created in the first year of a repo transaction was relatively small compared to the face value of the T-Bill involved in the transaction, petitioners had to engage in huge quantities of repos in order to generate the promised deductions. Accordingly, they created documents reflecting that a dormant shell company and two clearing brokers controlled by them had conducted the necessary repo transactions. The deductions supposedly created were then passed through various investment partnerships to unwitting investors. Pet. App. A3-A7.

The evidence at trial established that petitioners did not engage in any actual trading and that the purported repo transactions were in fact shams. Pet. App. A6-A9. After the jury had returned its verdict, the district court gave the jury a supplemental interrogatory asking whether the jury had concluded that the transactions never took place or that they lacked economic substance.[2] The jury responded that it had found that the transactions never occurred. *Id.* at A9-A10.

b. During a break toward the end of the government's closing argument, and in the absence of defense counsel, one of the prosecutors initiated a conference with the district judge. The conference was transcribed, and the transcript was sealed until after the government's rebuttal. During the *ex parte* conference the prosecutor advised the judge that he in-

[2] The government had argued that the transactions had never taken place and, in the alternative, that if the transactions had occurred they were devoid of risk and, therefore, lacking in economic substance. Pet. App. A9.

tended to utilize a chart during his rebuttal that consisted of a list of witnesses' names together with quotations or paraphrases of their trial testimony. The prosecutor explained that he was informing the court *ex parte* because, while he did not want to reveal his plans for rebuttal until defense counsel had given their closing arguments, he did want the court to be aware of his intention to use the chart so that the court could set aside sufficient time for a hearing in the event of defense objections to the use of the chart. Pet. App. A17-A18.

The prosecutor also stated that he would disclose the chart to defense counsel prior to their closing arguments if the court believed that was necessary. The district judge responded that she did not think the chart had to be disclosed at that time. The judge also stated that she would check the accuracy of the entries on the chart in order to be in a position to rule on any defense objections. Pet. App. A18.

After petitioners had completed their closing arguments, the government informed them that it intended to use the chart on rebuttal. The district court gave petitioners 45 minutes to review the accuracy of the chart, which consisted of 28 quotations or paraphrases. Although petitioners objected to the use of the chart and requested surrebuttal, they did not identify any specific inaccuracies in the chart that would justify preventing its use. The district court overruled the objection and denied the request for surrebuttal. Pet. App. A18.

2. The court of appeals affirmed. Pet. App. A1-A25. The court first found that no extraordinary circumstances justified the *ex parte* conference and that it was therefore improper. *Id.* at A19. The court held, however, that reversal would be required

only if the *ex parte* contact affected the fairness of the trial. *Ibid.*

Two facts convinced the court of appeals that reversal was not required in this case. Pet. App. A20. First, the court found that "because the chart was clearly accurate and within the scope of rebuttal, there is no reason to believe that the district court would have ruled differently absent the *ex parte* conference." *Ibid.* Second, the court of appeals expressed doubt that, in the context of a four-month trial, the chart played even a minimal role in influencing the jury's verdict. The court pointed out that the prosecution had presented substantial evidence that the purported repo transactions never occurred, and it found that the chart "did not present any new information or any information that could not have been conveyed easily to the jury without the chart." *Ibid.* Thus, the court held that the "highly improper *ex parte* conference" did not constitute reversible error. *Ibid.*

The court of appeals also rejected petitioners' contention that they were unfairly prejudiced when, during the course of the trial, the district court allegedly reversed its position concerning the proper definition of "economic substance." Pet. App. A22. The court of appeals first suggested that no such reversal occurred, because "[t]he [district] judge did not provide the parties with a precise definition of economic substance until her instructions to the jury." *Id.* at A23. Prior to trial, the judge had stated only that the parties should present evidence on " 'whatever factors you believe are relevant' " to the question of economic substance. *Ibid.*

The court of appeals concluded, however, that it was unnecessary to resolve the question whether the district court had reversed itself on this issue. In response to the special interrogatory, the jury found that the transactions " 'were fictitious and did not take place.' " Pet. App. A23. That finding, in the court's view, "rendered the jury's understanding of the term 'economic substance' irrelevant to the outcome." *Ibid.*

Petitioners also claimed that the district court improperly instructed the jury on the element of willfulness. Pet. C.A. Br. 91-93. The court of appeals rejected that contention without discussion. Pet. App. A20-A21.

ARGUMENT

1. Petitioners contend (92-1434 Pet. 7-23; 92-1448 Pet. 11-15) that the court of appeals erred in holding that the *ex parte* conference in this case did not constitute reversible error. The court of appeals correctly determined, however, that any error was harmless.

a. It is settled law that *ex parte* communications between the prosecutor and the trial judge do not constitute reversible error unless they result in prejudice to the accused. *United States* v. *Walsh*, 700 F.2d 846, 858 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *Brown* v. *Dixon*, 891 F.2d 490, 495-496 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990); *United States* v. *Earley*, 746 F.2d 412, 417 (8th Cir. 1984); *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); *United States* v. *Adams*, 785 F.2d 917, 921

(11th Cir.), cert. denied, 479 U.S. 858 (1986).[3] That rule is in accord with decisions of this Court establishing that harmless-error analysis is the norm, not the exception, when a criminal defendant's constitutional rights have been violated. See *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263 (1991); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-257 (1988); *Rushen* v. *Spain*, 464 U.S. 114, 118 n.2 (1983) (per curiam); *Chapman* v. *California*, 386 U.S. 18, 22 (1967).

The court of appeals in this case properly applied the rule that *ex parte* contacts are subject to harmless-error analysis. Observing that the chart was clearly accurate and within the scope of rebuttal, the court found "no reason to believe that the district court would have ruled differently absent the *ex parte* conference." Pet. App. A20.[4] In addition, the

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[3] See also *Rushen* v. *Spain*, 464 U.S. 114, 117-121 (1983) (per curiam) (*ex parte* contact between judge and juror harmless error); *LaChappelle* v. *Moran*, 699 F.2d 560, 566-567 (1st Cir. 1983) (*ex parte* contact between trial judge and witness not *per se* unconstitutional).

[4] Petitioner Manko contends (92-1448 Pet. 13-14) that the district court "could have" ruled more favorably to the defense in one of several ways. The relevant point, however, is that the district court would not have ruled differently absent the *ex parte* hearing, and thus it is impossible to identify any prejudice suffered by petitioners as a result of that hearing. The prosecutor was under no obligation to give the defense a preview of his rebuttal, cf. *United States* v. *Windham*, 489 F.2d 1389, 1392 (5th Cir. 1974) (government did not have to disclose rebuttal witnesses to defense), and he simply could have waited until the defendants completed their summations before asking to use the chart. Manko offers no reason to believe that the district judge would have ruled differently if she had first become aware of the chart in that manner.

court doubted that the chart played even a minimal role in influencing the jury verdict, given the length of the trial, the substantial evidence presented by the prosecution to show that the purported repo transactions never occurred, and the fact that the chart did not present any new information or any information that could not have been easily conveyed to the jury without the chart. Thus, the court held that the *ex parte* conference did not constitute reversible error. *Ibid.* That fact-bound determination is not worthy of further review.

b. Petitioner Edelman erroneously contends (92-1434 Pet. 8-14) that the court of appeals did not have a sufficient record before it to determine whether the *ex parte* contact in question was in fact harmless. The court of appeals had before it a transcript of the challenged *ex parte* conference. 92-1434 Pet. App. 29a-30a. That transcript enabled the court to ascertain whether the contact was prejudicial.

Edelman asserts (92-1434 Pet. 9), however, that the transcript is incomplete on its face. He also contends (*id.* at 8-9) that the chart that was shown to the judge was not before the court of appeals. But Edelman failed to raise those issues in either his opening brief or his reply brief on appeal, and the court of appeals did not address them.[5] Thus, those issues should not now be considered. See *United States* v. *Williams*, 112 S. Ct. 1735, 1738-1739 (1992).

In any event, the record before the court of appeals was sufficient to permit consideration and rejection of petitioners' claims. Contrary to Edelman's con-

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[5] Edelman first challenged the adequacy of the record before the court of appeals in his petition for rehearing.

tention, the transcript is not incomplete on its face. The transcript (92-1434 Pet. App. 29a-30a) begins with the trial judge's asking the prosecutor, "What is it you have handed me." *Id.* at 29a. The prosecutor then explains that the document is a copy of a chart that he intends to utilize during his rebuttal. *Id.* at 29a-30a. The transcript concludes as follows (*id.* at 30a):

> Mr. Cleary [the prosecutor]: Thank you, Judge.
>
> The Court: All right.

Thus, the transcript is complete on its face.

Although the chart shown to the judge was not itself part of the record on appeal, the substance of the chart was before the court of appeals. During the *ex parte* conference, the prosecutor described the chart as "list[ing] witness' names and either quotations or paraphrases of their testimony." 92-1434 Pet. App. 29a. Similarly, in open court one of the defendants' lawyers described the chart given him by the prosecutor prior to rebuttal as "containing 28 quotations from the record." *Id.* at 34a. Finally, during his rebuttal argument (see, *e.g.*, Tr. 6945-6946, 6956-6959, 6985-6987, 7018-7022), the prosecutor expressly referred to the chart and discussed quotations or paraphrases that the court of appeals could reasonably infer appeared on the chart; that argument was transcribed and was before the court of appeals as part of the trial transcript.[6] Thus,

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[6] During the prosecutor's rebuttal, defense counsel objected to entries on the chart that they believed to be inaccurate. On the two occasions when minor inaccuracies were found, the prosecutor corrected the chart. Tr. 6946, 6985. Neither on

there is no reason to believe that the court of appeals was not sufficiently aware of the contents of the chart.

In short, the court of appeals had both a complete transcript of the *ex parte* conference and the transcript of the rebuttal argument before it when it considered petitioners' claims. This case is therefore not in conflict with *Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989), upon which Edelman relies (92-1434 Pet. 9-10). In *Guenther*, a tax fraud case, a memorandum that "allegedly impugned the character of the taxpayers" was presented to the trial judge *ex parte* by the government. 889 F.2d at 884. The memorandum was not in the record, and the court of appeals therefore concluded that it "d[id] not have sufficient knowledge to enable [it] to determine whether taxpayers might have been prejudiced." *Ibid.* Accordingly, the court remanded for an evidentiary hearing. *Id.* at 885. In this case, by contrast, the record provided the court of appeals with sufficient information to determine that no prejudice resulted from the *ex parte* conference, and thus a remand was not required.

Edelman also errs in contending (92-1434 Pet. 10-11) that the decision below conflicts with *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986), and *Grieco* v. *Meachum*, 533 F.2d 713, 719 (1st Cir.), cert. denied, 429 U.S. 858 (1976). In *Paradyne Corp.*, the court required the district judge to release to the defendants the transcript of an *ex parte* communication between the judge and the prosecution concerning the government's attempt to disqualify defense counsel. 803 F.2d at 612. In this case, by

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appeal nor in this Court have petitioners established that any other entries on the chart were inaccurate.

contrast, the transcript of the *ex parte* conference was unsealed by the district court after trial, and both petitioners and the court of appeals had access to it. *Paradyne Corp.* certainly does not suggest that the failure to provide petitioners with a copy of the transcript immediately after completion of the *ex parte* hearing requires reversal despite the absence of any prejudice to petitioners.

In *Grieco* v. *Meachum*, the court refused to overturn the convictions of several defendants despite the fact that, at trial, the prosecutor provided the trial court, but not defense counsel, with trial memoranda. 533 F.2d at 719. The court of appeals held that "the practice of submitting *ex parte* trial memoranda, although meriting censure, is not a per se violation of [the defendants'] due process rights," and declined to set aside the convictions in light of the defendants' inability to identify any specific prejudice they might have suffered from the *ex parte* trial memoranda. *Ibid.*

The *Grieco* court reached its determination without benefit of the trial memoranda in question. The court noted that "[t]he trial briefs were not available in the district court. A search of the Massachusetts court records did not reveal them, and the prosecutor could only find one partial sample memorandum in his personal files. The prosecutor, however, testified that the sample corresponded to his memory of the trial briefs." 533 F.2d at 719 n.5. Thus, *Grieco* is directly inconsistent with Edelman's assertion that the court of appeals erred in relying on the record before it to reject petitioners' claims.[7]

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[7] The decision below is also consistent with *State* v. *McGuinn*, 232 S.E.2d 229 (S.C. 1977), on which Edelman relies (92-1434 Pet. 11). In that case, the court remanded

c. Edelman claims (92-1434 Pet. 12-13) that the court of appeals' decision conflicts with the decisions of other courts of appeals that require the government to establish that an *ex parte* contact constituted harmless error. See *id.* at 12 (citing *Haller* v. *Robbins*, 409 F.2d 857, 860 (1st Cir. 1969); *United States* v. *Hackett*, 638 F.2d at 1188; *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992)). Edelman's claim is without merit.

The court of appeals in this case did not explicitly address the question of which party bore the burden of proof on the harmless-error issue. In any event, the government satisfied whatever burden it may have had to show lack of prejudice. In the first place, the government established that the use of the chart in rebuttal was proper and that the district court would have permitted that use of the chart even if no *ex parte* contact had occurred. Pet. App. A19-A20. In addition, as the court of appeals found, it was doubtful that the chart played even a minimal role in influencing the jury verdict. *Id.* at A20. Thus, the government demonstrated that the *ex parte* conference did not constitute reversible error.[8]

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for resentencing because there was no way to determine whether the *ex parte* conference, which had not been transcribed, was prejudicial. 232 S.E.2d at 231.

[8] Edelman asserts (92-1434 Pet. 11) that, in declining to reverse petitioners' convictions, the court of appeals improperly relied on the fact that the trial lasted four months. In pointing to the length of the trial, however, the court was merely demonstrating how unlikely it was that the use of a chart in closing argument could have influenced the jury in any significant way in its deliberations. The court did not suggest that the length of the trial would have prevented

In arguing that the court of appeals improperly placed the burden of proof on petitioners, Edelman apparently relies (92-1434 Pet. 13) on the court's observation (Pet. App. A19) that petitioners had not pointed to any inaccuracies in the prosecutor's chart and had not identified any way in which the chart went beyond proper rebuttal. That comment does not indicate, however, that the court required petitioners to establish prejudice. The court's comment related solely to the propriety of allowing the government to use the chart in rebuttal. Immediately after addressing that issue, the court pointed out that "[o]f course, the propriety of using the chart cannot be the measure of whether the *ex parte* proceeding constituted reversible error" (*Id.* at A20), and went on to find from the facts before it that petitioners did not suffer any prejudice from the *ex parte* conference. *Ibid.*[9]

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a reversal if petitioners had suffered prejudice from the *ex parte* contact.

[9] Moreover, the cases on which Edelman relies do not preclude courts from considering whether the defendant has been able to identify any prejudice resulting from the improper *ex parte* contact. In *United States* v. *Hackett*, for example, the court expressly observed that the defendant had not identified any specific prejudice resulting from the *ex parte* contact. 638 F.2d at 1188. Similarly, in *Grieco* v. *Meachum*, the First Circuit (the same court that previously decided *Haller* v. *Robbins*), relied in part on the fact that the defendants had not been able to point to any specific prejudice caused by the *ex parte* contact. 533 F.2d at 719. Finally, in *United States* v. *Minsky*, there was no reason for the court to consider whether the defense had identified any prejudice, because the potential for prejudice was obvious: as a result of the *ex parte* conference, the defense had been improperly denied access to a statement that would have allowed the defense to undermine the credibility of a key government witness. 963 F.2d at 874.

d. Edelman erroneously contends (92-1434 Pet. 13-14) that the court of appeals' opinion is inconsistent with *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam). In that case, this Court "emphatically disagreed[d]" with the proposition that unrecorded *ex parte* contacts between a trial judge and a juror can never be harmless error. 464 U.S. at 117. The Court held instead that the prejudicial effects of a judge's failure to disclose such contacts can ordinarily be determined by a post-trial hearing. *Id.* at 119.

Edelman observes (92-1434 Pet. 14) that there was no post-trial hearing in this case. On this record, however, no hearing was necessary. Here, unlike in *Rushen* v. *Spain*, a transcript of the *ex parte* conference was available, and the record provided the court of appeals with a sufficient means of determining the contents of the chart given the judge.[10]

e. Petitioners contend (92-1434 Pet. 15-16; 92-1448 Pet. 14-15) that the decision of the court of appeals is irreconcilable with *United States* v. *Minsky*, 963 F.2d 870 (6th Cir. 1992). In *Minsky*, however, the *ex parte* conference was demonstrably prejudicial to the defendant. The conference took place at a time

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[10] Edelman also notes (92-1434 Pet. 14) that this case involves *ex parte* contact between a prosecutor and the judge, rather than, as in *Rushen* v. *Spain*, contact between the judge and "an unsophisticated and presumably neutral juror." It is unclear, however, what solace Edelman derives from that distinction. Obviously, the concern in *Rushen* v. *Spain* was that the judge might have had some improper influence on the juror, not that the juror might have influenced the judge. If anything, the risk of prejudice created by an *ex parte* contact with an "unsophisticated" juror is greater than that posed by a prosecutor's *ex parte* contact with a judge, who is trained in the law and is familiar with judicial proceedings, and who was not the factfinder in this case.

when the defense was arguing that FBI interview reports were subject to disclosure under the Jencks Act and *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the conference concerned that matter. 963 F.2d at 872-874. Immediately after the conference, the trial court declined to order disclosure of a statement that might have undermined the credibility of a key government witness. *Id.* at 873. The court of appeals pointed out that the government had "proffered no explanation why the defense was denied an opportunity to participate in a conference at such a critical stage of the proceedings." *Id.* at 874.

By contrast, the *ex parte* conference in this case did not occur at a critical stage of the proceedings and was not prejudicial. Unlike the defendant in *Minsky*, petitioners were not deprived of any information to which they were entitled that might have affected the outcome of the case.[11] Petitioners had a meaningful opportunity to challenge the use of the chart and its accuracy. Moreover, as the court of appeals found (Pet. App. A20), there is no likelihood that the district court's ruling on the use of the chart would have been different absent the conference, nor is there any likelihood that the use of the chart had any significant impact on the jury's verdict.

Minsky does not suggest that reversal is required under these circumstances. To the contrary, the *Minsky* court recognized that an *ex parte* communication between a judge and prosecutor may constitute harmless error. 963 F.2d at 874. Thus, the standards announced in *Minsky* are consistent with those ap-

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[11] Petitioners cite no authority entitling a defendant to advance information about the prosecutor's rebuttal summation.

plied in this case, and the fact-bound question whether the court of appeals properly found that petitioners suffered no prejudice does not warrant review by this Court.[12]

f. Petitioners next contend (92-1434 Pet. 19-20; 92-1448 Pet. 12) that reversal was automatically required because the *ex parte* conference was a critical stage of the trial. That contention is incorrect.

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[12] Petitioner Edelman errs in suggesting (92-1434 Pet. 16 & n.13) that the decision below conflicts with various decisions of state supreme courts. In *Rose* v. *State*, 601 So. 2d 1181 (Fla. 1992), for example, the court reversed and remanded after the trial court adopted the State's proposed order rejecting the defendant's motion for post-conviction relief in a death penalty case without holding an evidentiary hearing or even giving defense counsel notice of the receipt of the proposed order or an opportunity to respond. 601 So. 2d at 1182-1183. The court made clear, however, that while judges should not engage in *ex parte* contacts, "this would not include *strictly* administrative matters not dealing in any way with the merits of the case." *Id.* at 1183. In *Sanborn* v. *Commonwealth*, 754 S.W.2d 534 (Ky. 1988), the court characterized the trial judge's *ex parte* contact with the prosecutor (754 S.W.2d at 549) as an "erro[r] which would not qualify individually as reversible error." *Id.* at 542. In *State* v. *Crawford*, 577 P.2d 1135, 1143 (Idaho 1978), the *ex parte* contact was highly prejudicial: based on the prosecutor's *ex parte* motion, the trial court ordered the defendant physically restrained during trial, with the result that "[n]either the defendant nor his attorney had any opportunity before the prospective jurors saw him manacled and shackled to contest the order that the defendant be restrained." 577 P.2d at 1142. Finally, *State* v. *Barker*, 420 N.W.2d 695 (Neb. 1988), is inapposite, because the court based its holding on state law and expressly stated that "consideration of questions reaching constitutional dimensions is unnecessary for disposition of [this] appeal." 420 N.W.2d at 697; see *id.* at 698-699.

An *ex parte* contact is not necessarily a critical stage of a criminal proceeding such that the absence of the defendant and his counsel requires reversal without a showing of prejudice. In *Rushen* v. *Spain*, for example, this Court held that an *ex parte* contact between the judge and a juror did not warrant reversal in the absence of prejudice. 464 U.S. at 117-119. Similarly, the courts of appeals have repeatedly held that an *ex parte* but nonprejudicial contact between a trial judge and a prosecutor does not constitute reversible error. See, *e.g.*, *United States* v. *Walsh*, 700 F.2d at 858; *Brown* v. *Dixon*, 891 F.2d at 495-496; *United States* v. *Minsky*, 963 F.2d at 874; *United States* v. *Earley*, 746 F.2d at 417; *United States* v. *Hackett*, 638 F.2d at 1188; *United States* v. *Adams*, 785 F.2d at 921. Petitioners cite no authorities to the contrary.

In this case, the *ex parte* conference was not a critical stage of the trial. The conference was purely administrative in nature and had nothing to do with the merits or substance of the case. The prosecutor brought the chart to the district judge's attention simply in order to permit the judge to "allot whatever time is necessary between the end of the last defense summation and the beginning of the rebuttal summation should there be objection." Pet. App. A18. He did not attempt to make any argument to the judge in support of the use or accuracy of the chart. Although the judge indicated that she would check the accuracy of the quotations and paraphrases on the chart in order to be in a position to rule on any objections, she did not give any indication as to what her ruling might be or state that she would inform the prosecutor of the results of her review in

advance. *Ibid.* Thus, the meeting was not a critical stage of the trial.[13]

The critical stages occurred after the prosecutor had provided a copy of the chart to the defense and had indicated that he intended to use it during his rebuttal. At that point, petitioners were present and represented by counsel, and they had an opportunity to challenge the use of the chart before it occurred. Petitioners were also present and represented by counsel during the prosecutor's rebuttal, and could have objected at any time to any inaccurate or unduly prejudicial representations on the chart. Indeed, defense counsel did object on two occasions. Tr. 6946, 6985. In short, petitioners were not deprived of the effective assistance of counsel at any critical stage of the proceeding, and thus there is no basis for presuming prejudice. See *United States* v. *Cronic*, 466 U.S. 648, 659 & n.26 (1984); see also *Rushen* v. *Spain*, 464 U.S. at 118 n.2. The *ex parte* contact in this case simply did not constitute "a breakdown in the adversarial process that would justify a presump-

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[13] Petitioner Edelman attempts to characterize this conference as "secret assistance" (92-1434 Pet. 20-23) by the judge to the prosecutor and a discussion of "prosecution strategy." *Id.* at 17. In fact, however, the judge did not give any assistance to the prosecutor: she did not indicate that she would allow the use of the chart, and she offered no advice whatsoever as to how the prosecutor might use the chart during rebuttal, what he might argue in response to an objection to the chart, or what he might argue in rebuttal. While the judge told the prosecutor that he need not disclose the chart to defense counsel before they had completed their summations, that statement did not rise to the level of improper assistance or discussion of strategy, because there is no basis for suggesting that the defense was entitled to a preview of the prosecutor's rebuttal in any event.

tion that [petitioners'] conviction was insufficiently reliable to satisfy the Constitution." *Cronic*, 466 U.S. at 662; see also *Arizona* v. *Fulminante*, 111 S. Ct. at 1265.

g. Finally, petitioners argue (92-1434 Pet. 24-25; 92-1448 Pet. 11) that the court of appeals essentially sanctioned the actions of the prosecutor in this case by holding that the error was harmless. Although they can point to no prejudice they suffered as a result of the *ex parte* conference, petitioners suggest (92-1434 Pet. 24-25; 92-1448 Pet. 15) that their convictions should be reversed in order to send a message to prosecutors and district judges.

The court of appeals did not condone the prosecutor's actions in this case.[14] In any event, petitioners' argument is beside the point, because the federal courts "may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by" Fed. R. Crim. P. 52(a). *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). In *United States* v. *Hasting*, 461 U.S. 499, 506 (1983), a case involving constitutional error, this Court explained that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." Similarly, in *Bank of Nova Scotia* the Court suggested that nonprejudicial errors should be punished by remedies that "focus on the culpable individual rather than granting a windfall to the unprejudiced defendant." 487 U.S. at 263. In

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[14] The court of appeals referred to the *ex parte* conference as "highly improper" and "wholly unnecessary." Pet. App. A18-A20.

this case, the court of appeals complied with that mandate by delivering a stern lecture to the prosecutor while affirming petitioners' convictions in light of the government's showing of a lack of prejudice. Further review is not warranted.

2. Petitioner Manko contends (92-1448 Pet. 15-20) that the district court erred in declining to give his requested jury instruction that a person can act in good faith "regardless of whether that belief was reasonable." *Id.* at 17. Manko asserts (*id.* at 17) that the absence of the requested instruction allowed the jury to subject his claimed good-faith belief in the legality of his conduct to an objective reasonableness test in violation of *Cheek* v. *United States*, 498 U.S. 192 (1991). That contention is without merit.

a. A defendant is not entitled to have the jury instructed in his particular words; it is sufficient if the instructions adequately and correctly cover the substance of the requested instruction. See, *e.g.*, *United States* v. *Durades*, 929 F.2d 1160, 1167 (7th Cir. 1991); *United States* v. *Ross*, 920 F.2d 1530, 1534-1535 (10th Cir. 1990); *United States* v. *Frazin*, 780 F.2d 1461, 1468 (9th Cir.), cert. denied, 479 U.S. 844 (1986). The adequacy of the instructions must be evaluated in the context of the charge as a whole. See *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

A mistaken belief, held in good faith, that one has complied with the tax laws negates the element of willfulness and therefore constitutes a defense to certain criminal tax offenses. *Cheek* v. *United States*, 498 U.S. at 199-201. In *Cheek*, the Court held that such a belief need not be objectively reasonable in order to negate willfulness. *Id.* at 201.

In this case, the district court adequately instructed the jury concerning the element of willfulness and the good-faith defense. First, in defining willfulness, the court stated (Gov't C.A. Br. 94): "[W]ilfully means voluntarily, deliberately and intentionally, with a specific intent to do something the law forbids, that is to say, with a purpose to disobey or disregard the law. Negligent conduct is not sufficient to constitute wilfulness." That instruction correctly stated the law with respect to willfulness. *United States* v. *Pomponio*, 429 U.S. 10, 11-13 (1976) (per curiam); *Cheek* v. *United States*, 498 U.S. at 200.

The district court also instructed the jury on the good-faith defense.[15] The court stated, in part (Pet. App. E13) (emphasis added):

> The good faith of the defendant is a complete defense to the tax charges of the indictment because good faith is simply inconsistent with willfully filing a fraudulent tax return.
>
> While the term "good faith" has no precise definition, it means, among other things, an honest belief and the intent to perform all lawful obligations. *A person who acts on a belief or an opinion honestly held is not punishable under this statute merely because that honest belief turns out to be incorrect or wrong.* The tax laws subject to criminal punishment only those people who wilfully file a fraudulent tax return.
>
> A person who believes that his tax return truthfully reports the taxable income and allow-

[15] Such an instruction is not required. *United States* v. *Pomponio*, 429 U.S. at 13. In *Pomponio*, this Court held that the trial judge had "adequately instructed the jury on willfulness," and that "[a]n additional instruction on good faith was unnecessary." 429 U.S. at 13; see *Cheek* v. *United States*, 498 U.S. at 201.

> able deductions under the tax law acts in good faith and cannot be found guilty of wilfully filing a false return. Therefore, the government must prove beyond a reasonable doubt that the defendant you are considering knew that the tax law permitted only the deduction of interest paid on genuine indebtedness and that the defendant did not have a good faith belief that the transactions involved herein constituted genuine indebtedness.

That instruction told the jury that an honestly held opinion or belief, even though incorrect or wrong, was sufficient to negate willfulness. Thus, there is no merit to Manko's contention (92-1448 Pet. 15) that the district court failed to instruct the jury that it had to determine Manko's good faith "based on what [he] honestly believed."

Cheek did not require the jury to be instructed that good faith is a defense even if it is objectively unreasonable. Rather, *Cheek* held only that it was error to instruct the jury that a good-faith belief must be objectively reasonable in order to provide a valid defense. 498 U.S. at 201. No such erroneous instruction was given in this case, and the instructions that were given were plainly sufficient to convey to the jury the subjective nature of the willfulness element.

b. Manko also contends (92-1448 Pet. 17-20) that the prosecutor's summation had the effect of misleading the jury concerning the meaning of good faith, and that the district court was therefore required to "correct the false impression left by the prosecution." *Id.* at 18. In fact, however, the prosecutor did not state or imply to the jury that petitioners' beliefs had to be objectively reasonable in order to negate willfulness. The prosecutor simply invited the jury to

consider the reasonableness of petitioners' claims in deciding whether petitioners actually believed their conduct was legal. That invitation was entirely proper.

In *Cheek*, this Court expressly recognized the jury's right to consider the reasonableness of the defendant's asserted good-faith belief in determining whether the defendant actually held that belief (498 U.S. at 203-204):

> Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Similarly, in *United States* v. *Powell*, 955 F.2d 1206, 1212 (9th Cir. 1992), on which Manko relies (Pet. 16), the court specifically recognized that the jury may consider the "reasonableness" of a defendant's alleged beliefs in determining whether he actually held them. Accord *United States* v. *Barnett*, 945 F.2d 1296, 1299 (5th Cir. 1991), cert. denied, 112 S. Ct. 1487 (1992); *United States* v. *Collins*, 920 F.2d 619, 622-623 (10th Cir. 1990) (upholding instruction that "if you regard [the defendant's] belief as being highly unreasonable, you may consider this along with all other evidence on the question of whether his belief was indeed genuine or merely feigned"), cert. denied, 111 S. Ct. 2022 (1991); *United States* v. *Turano*, 802 F.2d 10, 11 (1st Cir. 1986) ("The jury * * * must use whatever evidence they can to determine what [the defendant] believed. The more unreasonable the defendant's alleged belief that he did

not have to file a tax return, the less likely he, in fact, held that belief.").

Furthermore, telling the jury that it may consider the reasonableness of a defendant's claimed belief in determining whether the belief is actually held does not in any way imply that the belief, if found to be genuine, may be disregarded if it is not objectively reasonable.[16] Thus, there was no need for Manko's proposed jury instruction that a person can act in good faith "regardless of whether his belief was reasonable." 92-1448 Pet. 8.

In short, the instructions given by the district court, taken as a whole, properly focused the jury's attention on Manko's actual (*i.e.*, subjective) state of mind. *Cheek* requires no more.

c. There is no reason to hold the petition in No. 92-1448 pending this Court's resolution of *Ratzlaf* v. *United States*, cert. granted, No. 92-1196 (Apr. 26, 1993). That case presents the question whether ignorance of the law is a defense in a prosecution under 31 U.S.C. 5324(3) for willfully structuring currency transactions in order to evade currency reporting requirements. In essence, the petitioners in *Ratzlaf* contend that the good-faith defense enunciated in *Cheek* v. *United States* should be extended to the

---

[16] Indeed, the supposedly erroneous statement by the prosecutor cited by Manko (92-1448 Pet. 19) actually reinforced the subjective good-faith standard. The prosecutor stated: "But if you think what I just suggested is absolutely ridiculous, and *the defendants know that*, then it's your duty to convict them." *Ibid.* (emphasis added). Thus, the prosecutor asked the jury to consider whether petitioners knew that what they were doing was a sham, and to convict them only if they possessed such knowledge. That request was entirely consistent with this Court's decision in *Cheek*.

context of currency transactions, and the government disputes that contention. In this case, by contrast, all parties concede that *Cheek* applies, and the only question is whether the district court's instructions and the prosecutor's summation complied with the requirements of *Cheek*. Accordingly, the decision in *Ratzlaf* will shed no light on the proper disposition of this case.

3. Petitioner Manko also argues (92-1448 Pet. 20-24) that the court of appeals applied a test for determining the deductibility of interest payments that is in conflict with the test applied by several other circuits. The cases on which Manko relies (*id.* at 21-22), however, hold that interest payments are deductible only if the debt was real and interest payments were actually made. See *Rice's Toyota World, Inc.* v. *Commissioner*, 752 F.2d 89, 96 (4th Cir. 1985); *Smith* v. *Commissioner*, 937 F.2d 1089, 1098 (6th Cir. 1991); *James* v. *Commissioner*, 899 F.2d 905, 910 (10th Cir. 1990). In this case, the jury specifically found, in response to a special interrogatory, that the repo transactions were fictitious and never took place. Pet. App. A23. Thus, Manko would not have been able to take an interest deduction under any circuit's law. The issue on which Manko seeks review is therefore not presented on the facts of this case.

Manko contends (92-1448 Pet. 24), however, that the jury's response to the special interrogatory could have been the product of confusion caused by the district court's charge on the law regarding the deductibility of interest. He points to an instruction (Pet. App. E12) to the effect that the repo transactions would not support interest deductions if they "were

without economic substance, that is, that they lacked a reasonable possibility of profit apart from tax deductions, and they lacked market risk." According to Manko, "[a] finding that the transactions were 'fictitious' could have been based on the erroneous instruction that a transaction without 'economic substance' is 'fraudulent'." 92-1448 Pet. 24.

Manko's case-specific contention is not worthy of review, and in any event is without merit. The special interrogatory submitted to the jury asked it to indicate whether it had found that the transactions at issue had never taken place *or* that the transactions lacked economic substance. Pet. App. A10. Thus, the jury was informed that there was a difference between transactions that lacked economic substance and those that "were fictitious and did not take place." [17] Accordingly, the interrogatory and the jury's response unambiguously indicated that the verdict was based on the jury's finding that the transactions never took place. There is simply no reason to believe that the jury ignored its instructions and erroneously equated fictitiousness with lack of economic substance. See *United States* v. *Olano*, No. 91-1306 (Apr. 26, 1993), slip op. 15 (jurors presumed to follow instructions); *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985) (same).

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[17] Similarly, the jury instructions clearly differentiated between transactions that never occurred, on the one hand, and transactions that lacked economic substance, on the other. Pet. App. E12 (authorizing jury to convict if it found "either, one, that the transactions were a sham, that is, that they never occurred, or the alternative, two, that the transactions lacked economic substance," and defining each alternative separately).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JON EDELMAN,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

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1. The Decision Conflicts With Holdings of Other Circuits and of This Court That There Must Be a Complete Record Before an *Ex Parte* Meeting Can Be Held To Be Harmless.

The Brief in Opposition does not deny that the First, Ninth and Eleventh Circuits, as well as several state supreme courts, forcefully hold that in reviewing *ex parte* meetings in a criminal trial, "[w]e can only serve our function when the record is clear as to the relevant facts . . . ." *United States* v. *Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987). See Pet. 8-12. To that list now can be added the Eighth Circuit, which six weeks ago held that an allegation of an *ex parte* meeting between a federal judge and a prosecutor and witness required an evidentiary hearing. *United States* v. *LaFuente*, 1993 U.S. App. Lexis 8181 (8th Cir. Apr. 19, 1993). The Eighth Circuit explained:

> "The government denies the allegation, but has not offered any affidavit to refute it. Accordingly, we must remand this case to the district court with directions that it hold an evidentiary hearing to determine whether any such ex parte conferences occurred."

1993 U.S. App. Lexis 8181 at *6 (footnote omitted).

That is exactly the situation here: arguments from the government, but no affidavit. Yet the Second Circuit, with one of the most active federal criminal dockets in the country, holds diametrically the opposite of the Eighth and at least three others.[1] The Second Circuit's decision also conflicts with *Rushen* v. *Spain*, 464 U.S. 114 (1983), which provided clear guidance that even an *ex parte* contact between judge and juror that was part of the "day-to-day realities of courtroom life" called for an evidentiary hearing. See 464 U.S. at 119-20.

The Brief in Opposition simply asserts that "[h]ere, unlike in *Rushen* v. *Spain*, a transcript of the *ex parte* conference was available, and the record provided the court of appeals with a sufficient means of determining the contents of the chart given the judge." Br. Opp. 14 (footnote omitted). Yet the Brief in Opposition does not deny that the material the prosecutor handed the judge, and which the judge agreed to study, Pet. App. 30a, is

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[1] In atempting to distinguish some of these many cases, the government simply underscores the conflict. In *Grieco* v. *Meachum*, 533 F.2d 713 (1st Cir.), *cert. denied sub nom. Cassesso* v. *Meachum*, 429 U.S. 858 (1976), as the government acknowledges, "the prosecutor, however, testified" at a post-trial evidentiary hearing. Br. Opp. 11. Moreover, the affirmance in *Grieco* rested on waiver. See 533 F.2d at 719. In *Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989), where as here the document submitted *ex parte* was not in the record, the Ninth Circuit remanded "with instructions to conduct an evidentiary hearing." 889 F.2d at 885. The Brief in Opposition simply asserts that "[t]he decision below is also consistent with *State* v. *McGuinn*," 268 S.C. 112, 232 S.E.2d 229 (1977); but that case reversed exactly because there was no complete record of the *ex parte* activity.

nowhere in the record. The Brief in Opposition simply pretends, with no record support, that the transcript of some portion of the secret meeting was complete. Br. Opp. 9. For no affidavit was ever submitted stating that the transcript was complete. Nor did the district judge ever say that it was. The government's pretense that the transcript of the secret meeting in the robing room was complete is refuted by the transcript itself, which indicates that it began with the arrival of the court reporter.

The government also incorrectly asserts to this Court that petitioner failed timely to raise in the Court of Appeals the issue "that the transcript is incomplete on its face" and "that the chart that was shown to the judge was not before the court of appeals." Br. Opp. 8. It states that "Edelman first challenged the adequacy of the record before the court of appeals in his petition for rehearing." *Id.* at 8 n.5. The government's assertion is flatly mistaken. The issue was raised and argued in the reply briefs prior to argument in the Court of Appeals. See pertinent portions reproduced at Addendum A. It was reiterated on petition for rehearing.

2. The Decision Conflicts With Holdings of Other Circuits That the Burden To Establish Harmlessness Is on the Prosecution.

The Brief in Opposition does not deny that at least three circuits place upon the government the "heavy" burden of demonstrating that an *ex parte* communication between judge and prosecutor was harmless. *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992); *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *Haller* v. *Robbins*, 409 F.2d 857, 860 (1st Cir. 1969). See Pet. 12-13.

The Brief in Opposition also does not deny that the Second Circuit did not follow that rule here. The govern-

ment tries to shrug off this conflict with a comment that the Second Circuit "did not explicitly address the question." Br. Opp. 12. Indeed, the Second Circuit not only failed to "address" the rule elsewhere observed—it failed to follow it. It placed no burden on the government—not even the small burden of providing an affidavit to explain exactly what had occurred. The court of appeals affirmed because it concluded that whatever took place at the secret *ex part* meeting—at which, of course, neither petitioner nor his counsel was present—had not caused the district court to commit error. Pet. App. 18a-19a. That not only relieved the prosecution of its "heavy" burden, but shifted the burden to the defendant, who was not at the secret meeting. The Second Circuit affirmed "even if the conference did influence the judge's decision." Pet. App. 19a. Such a ruling assumes that secret *ex parte* meetings that bring about defensible discretionary rulings by the judge are harmless, an extraordinary proposition. This plainly is different law from that applied in the First, Sixth and Ninth Circuits.

3. This Court Should Resolve Whether an *Ex Parte* Meeting Involving Secret Collaboration Between Judge and Prosecution Is a Reversible Structural Defect, or Is Subject to Harmless-Error Analysis.

This Court's decision in *Sullivan* v. *Louisiana*, No. 92-5129 (U.S. June 1, 1993), reiterates that harmless-error analysis is inapplicable when there are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." Slip op. at 6, quoting *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991). This Court has frequently cited, as an example of such a "structural defect," bias on the part of the judge. See *Tumey* v. *Ohio*, 273 U.S. 510 (1927), cited in *Sullivan*, slip op. at 4. On the other hand, most ordinary *ex parte* exchanges are subject to harmless-error analysis—provided there is a clear and complete record of what happened. *Rushen* v. *Spain*, *supra*.

This case presents as a threshold question whether the proper analysis is (a) a reversible "structural defect," or instead (b) possible harmless error, when an *ex parte* meeting is of a kind so extreme as the one here—when it is held in secret and kept secret at the judge's direction, when the subject is prosecution strategy, and when the court of appeals concludes that the purpose was "a blatant attempt to win a tactical advantage, to get a 'leg up.' " Pet. App. 18a. Petitioner submits that a secret *ex parte* meeting of this nature so taints the decisional process that it most closely resembles the structural defect of a biased judge.[2] *Tumey* v. *Ohio*, *supra*. Thus last year in *United States* v. *Minsky*, 963 F.2d 870 (6th Cir. 1992), the Sixth Circuit reversed outright, holding that a recorded *ex parte* bench conference with the prosecutor was enough in itself to require reversal. *Minsky* and the Second Circuit's rule here are irreconcilable.[3]

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[2] The government's attempt to recharacterize the *ex parte* meeting as simply an innocent scheduling matter, Br. Opp. 17, was emphatically rejected in strong language by the Court of Appeals. Pet. App. 17a-18a.

[3] The government now argues that "in *United States* v. *Minsky*, there was no reason for the court to consider whether the defense had identified any prejudice, because the potential for prejudice was obvious . . . ." Br. Opp. 13 n.9. Yet previously the government's description of *Minsky* was the opposite: that "[t]he United States submits that no constitutional rights of the defendant were violated by the *ex parte* conference. In fact, the conference assured that neither the defendant's constitutional rights, and the governments [*sic*] rights to nondisclosure, were violated." Brief for the Plaintiff-Appellee United States of America, *United States* v. *Minsky*, No. 91-5861, U.S.C.A., 6th Cir., Jan. 17, 1992, at 42.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

Reply Brief for Defendant-Appellant Bernhard Fred Manko, No. 91-1732, U.S. Court of Appeals, Second Circuit, filed June 23, 1992, at 10 n.13:

> The government argues that the "complete transcript of the [*ex parte*] conference" (which was not consented to) shows it was conducted for a proper purpose. First, it is not complete because the material handed to the court was not made part of the record, and is therefore unfortunately not part of the record on appeal. Second, this transcript does not necessarily appear complete on its face (A. 1529-30) (and we suggest any omission is by oversight not design). It is unlikely that a dialogue with a court would begin with the words: "What is it you have handed me, Mr. Cleary?" (A. 1529). See *United States* v. *Salerno*, 937 F.2d 797, 813 (2d Cir. 1991), *rev'd on other grounds*, No. 91-872, 1992 U.S. LEXIS 3690, 1992 WL 134467 (U.S. June 19, 1992). Certainly, there were greetings, arrangements for the court reporter, and some remark before the document was actually handed over. It is simply not characteristic for a lawyer to begin a conference with a judge by handing over a document and not advising why it is handed over or what is in it. . . .

Reply Brief for Defendant-Appellant Jon Edelman, No. 91-1733, U.S. Court of Appeals, Second Circuit, filed June 23, 1992, at 33:

> For all the reasons stated above, in our main brief, and in the reply brief filed by co-defendant Manko, Edelman's judgment of conviction should be vacated or, alternatively reversed and a new trial ordered.